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IN THE
SUPREME COURT OF THE UNITED STATES
APRIL TERM, 1978

No. 77-1410

William E. Butner, Petitioner,

v.

United States of America, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
APRIL TERM, 1978

No. _____

IN THE MATTER OF:

Golden Enterprises, Inc., Bankrupt.

Golden Enterprises, Inc., and William E. Butner, Petitioners,

v.

United States of America, Respondent.

and

IN THE MATTER OF:

Golden Enterprises, Inc., Bankrupt.

Joe Cagle, Trustee in Bankruptcy for Golden Enterprises, Inc.; Attorneys for the Creditors' Committee; James M. Gaither, Jr., Attorney for Bankrupt; Golden Enterprises, Inc., Bankrupt; William J. Lawing, C.P.A., and Charles B. Camp, Respondents,

v.

William E. Butner, Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner, William E. Butner, prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Fourth Circuit entered in the above entitled cases on December 8, 1977, petition for rehearing denied on January 6, 1978. The decision reversed the judgment of the United States District Court for the Western District of North Carolina, Statesville Division, which, by decision dated November 12, 1976, declared Petitioner to be a secured creditor with respect to the rents derived from the encumbered property during Bankruptcy and remanded the case for determination of what costs and fees were properly chargeable against these rents.

OPINIONS BELOW

The Bankruptcy Court on July 1, 1976, declared Petitioner to be an unsecured creditor with respect to the rents derived from the encumbered property during bankruptcy. The order of the Bankruptcy Court (Appendix pp. 2a-20a) is unreported. The opinion of the District Court for the Western District of North Carolina, Statesville Division, reversing and vacating the decision of the Bankruptcy Court (Appendix pp. 21a-30a) is unreported. The majority opinion of the United States Court of Appeals for the Fourth Circuit, reversing the judgment of the District Court (Appendix pp. 31a-43a) is not officially reported on this date.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was made and entered on December 8, 1977, and a copy thereof is appended to this petition in the Appendix at pp. 31a-43a. The petition of William E. Butner for a rehearing was denied on January 6, 1978. (Appendix p. 44a) The motion of William E. Butner for a stay of mandate pending the filing of

a petition for Writ of Certiorari was denied on January 16, 1978. (Appendix p. 45a) The jurisdiction of this Court is invoked under 11 U.S.C. § 47(c) and 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. The first question presented is whether the difference in administration of the Federal Bankruptcy law in the various circuits on the question of the ability of a secured creditor to reach the rents from the encumbered property to satisfy his claim, violates the Constitution of the United States.

2. The second question presented is whether, where real property encumbered by a mortgage becomes involved in a bankruptcy proceeding, the mortgage holder may reach the rental income from the encumbered property to satisfy his claim without making any preliminary attempts to take possession of the property.

3. The third question presented is whether the Court below erred in holding that, where a corporation attempts an arrangement under Chapter XI of the United States Code and the arrangement is unsuccessful thus forcing the corporation into a straight bankruptcy proceeding, actions taken under the Chapter XI proceeding by a mortgageholder to establish his right to the rents of the mortgaged property did not establish his claim to the rents for purposes of the bankruptcy proceeding.

4. The fourth question is whether the Fourth Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the United States Supreme Court's power of supervision under U. S. Sup. Ct.

Rule 19(1)(b), 28 U.S.C., when it denied the second mortgageholder's right to the rents from the mortgaged property on the ground that actions taken in a Chapter XI proceeding to establish such rights do not carry over into an ensuing straight bankruptcy while reinstating the judgment of the United States Bankruptcy Court which gave priority over the second mortgageholder's claim to the claims of the respondents herein for fees and expenses generated during the Chapter XI proceeding.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S.C.A. Const. Art. I § 8

The Congress shall have Power ***

Clause 4. To establish an uniform Rule of Naturalization, and uniform laws on the subject of Bankruptcies throughout the United States;

11 U.S.C. §752

Where not inconsistent with the provisions of this chapter, the rights, duties, and liabilities of creditors and of all other persons with respect to the property of the debtor shall be the same, where a petition is filed under section 721 of this title and a decree of adjudication has not been entered in the pending bankruptcy proceeding, as if a decree of adjudication had been entered in such bankruptcy proceeding at the time the petition under this chapter was filed, or, where a petition is filed under section 722 of this title, as if a voluntary petition for adjudication in bankruptcy had been filed and a decree for adjudication had been entered at the time the petition under this chapter was filed.

11 U.S.C. §776(2)

If the statement of the executory contracts and

the schedules and statement of affairs, as provided by paragraph (1) of section 724 of this title, are not duly filed, or if an arrangement is not proposed in the manner and within the time fixed by the court, or if an arrangement is withdrawn or abandoned prior to its acceptance, or is not accepted at the meeting of creditors or within such further time as the court may fix, or if the money or other consideration required to be deposited is not deposited or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused, the court shall--

***

(2) where the petition was filed under section 722 of this title, enter an order, upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this title or dismissing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors: Provided, however, That an order adjudging the debtor a bankrupt may be entered without such hearing upon the debtor's consent.

Rules Bankr. Proc. Rule 201(a)

Purposes and Term of Receivership. Subject to the provisions of this rule, the court may appoint a receiver when necessary in the best interest of the estate (1) to take charge of the property of a bankrupt; (2) to conduct the business of the bankrupt; or (3) to afford representation to the estate in an action, adversary proceeding, or contested matter when no trustee has qualified or the interest of the trustee may be adverse to that of the estate. Such appointment shall be terminated when the trustee qualifies or there is no further need for a receiver, and the authorization to conduct the business of the bankrupt after

adjudication shall continue only for such time as may be in the best interest of the estate and consistent with orderly liquidation.

Rules Bankr. Proc. Rule 701, 11 U.S.C.

The rules of this Part VII govern any proceeding instituted by a party before a bankruptcy judge to (1) recover money or property, other than a proceeding under Rule 220 or Rule 604, (2) determine the validity, priority, or extent of a lien or other interest in property, (3) to sell property free of a lien or other interest for which the holder can be compelled to take a money satisfaction, (4) object to or revoke a discharge, (5) obtain an injunction, (6) obtain relief from a stay as provided in Rule 401 or 601, or (7) determine the dischargeability of a debt. Such a proceeding shall be known as an adversary proceeding.

Rules Bankr. Proc. Rule 601(e), 11 U.S.C.

(e) Availability of Other Relief. Nothing in this rule precludes the issuance of, or relief from, any stay, restraining order, or injunction when otherwise authorized.

Advisory Committee's Note

***

Subdivision (e). The stay provided by this rule is in no way a limitation on the discretion and power of the court of bankruptcy under §2a(15) of the Act [section 11(a)(15) of this title] to grant or deny or modify relief in the nature of an injunction.

U.S. Sup. Ct. Rule 19(1)(b), 28 U.S.C.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

***

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

11 U.S.C. §778

(a) Upon the entry of an order directing that bankruptcy be proceeded with--

***

(2) in the case of a petition filed under section 722 of this title, the proceeding shall be conducted, so far as possible, in the same manner and with like effects if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this chapter was filed; and the trustee nominated by creditors under this chapter shall be appointed by the court, or, if not so nominated or if the trustee so nominated fails to qualify within five days after notice to him of the entry of such order, a trustee shall be appointed by the court;

***

STATEMENT OF THE CASE

William E. Butner, Robert L. McKaughn, Jr., and Jack Sipe Construction Company held a second mortgage in the amount of $360,000.00 on real property

owned by Golden Enterprises, Inc., a North Carolina Corporation. Since that time Robert L. McKaughn, Jr., and Jack Sipe Construction Company have assigned all of their right, title and interest in the indebtedness and deeds of trust to William E. Butner, the Petitioner herein, thus making him the sole second mortgageholder.

On May 4, 1973, Golden Enterprises, Inc., filed a petition in bankruptcy for an arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C. Section 701, et seq. While the Chapter XI proceeding was pending, on April 7, 1974, upon motion by William E. Butner, Robert L. McKaughn, Jr., and Jack Sipe Construction Company to secure the debt to them in the amount of $360,000.00, and upon their agreement that they would not attempt to foreclose their deed of trust without Court approval, the Honorable Joseph R. Cruciani, Bankruptcy Judge, ordered that the note and deed of trust to them from Golden Enterprises, Inc., should be in the original amount of $360,000.00, reduced the rate of interest from twelve percent to ten percent per annum and further ordered "That the holders of the note or any assignee thereof shall not attempt to file a petition to reclaim or to foreclose except upon motion to this Court setting forth the reasons therefor."

On April 17, 1974, the first and second mortgageholders sought the appointment of an agent to collect the rental income from Golden Enterprises' property. On April 18, 1974, the Honorable Joseph R. Cruciani, Bankruptcy Judge, appointed Simon Joseph Golden as agent "to receive all income derived from debtor's real estate" and to apply that income to the payment of interest and principal on the second mortgage as well as to other enumerated debts of the corporation.

A plan of arrangement was never confirmed, and on February 14, 1975, Golden Enterprises, Inc., was adjudged a bankrupt, and the Honorable Joseph R. Cruciani appointed Joe N. Cagle as Trustee to take charge of the real estate and "to collect and receive all rents, issues, income and profits . . . due or to become due to the within estate, and to hold and retain all monies thus received to the end that the same may be applied under this or different or further orders of this Court . . . ."

The first mortgage payments had been kept current during the Chapter XI proceeding, but in February, 1975, the Trustee ceased making payments on the first mortgages, allegedly pursuant to an oral order issuing from someone in the office of the Bankruptcy Judge, although there is no direct evidence that any such further order was entered.

There now remains in the Trustee's hands approximately $162,971.32, all of which is rental income from the real property since the personal property was disposed of during the Chapter XI proceeding and its proceeds paid out to some creditors.

During the Bankruptcy proceeding, the second mortgageholder orally sought abandonment of the property to him. The Bankruptcy Judge gave repeated oral assurances to the second mortgageholder that, if, when the property was sold, the sale did not bring enough money to pay the first and second mortgage debts, he would not confirm the sale but would abandon the property. In the meantime, the Judge refused to abandon the property. At the first meeting of the creditors, the second mortgageholder sought abandonment, and the Judge indicated that he would abandon the property if the sale proceeds were insufficient to pay the mortgage debts and indicated in addition that

he was refusing to abandon the real estate because of his concern over how the costs of administration would be paid.

The real estate was sold at public auction on July 28, 1975, and the sale of two of the tracts was confirmed. William E. Butner appealed to the United States District Court for the Western District of North Carolina, Statesville Division.

After hearing the appeal, the Honorable Woodrow W. Jones, Judge, on November 7, 1975, ordered the Trustee to resell the real estate at public auction free and clear of all liens and encumbrances except the first deeds of trust thereon. Judge Jones further ordered that the second mortgageholder be allowed to use the outstanding principal balance of his Deed of Trust to bid at the bankruptcy resale.

At the resale, November 12, 1975, William E. Butner became the last and highest bidder for the property, with a bid of $174,000.00, thus leaving a balance due on his note of $186,000.00. However, at the final meeting of creditors to determine the distribution of the $162,971.32 in rents held by the Trustee, the Honorable Marvin R. Wooten, Bankruptcy Judge, declared the second mortgageholder a general creditor with respect to the balance due on his note while awarding, almost without exception, all claims arising during the Chapter XI proceeding as priority claims.

William E. Butner appealed this order to the United States District Court for the Western District of North Carolina, Statesville Division, where the Honorable Woodrow W. Jones, Chief Judge, reversed and vacated the Bankruptcy Judge's finding of William E. Butner's unsecured status as to the rents derived from the encumbered property. From this order the

United States and the Trustee, et al. appealed to the United States Court of Appeals for the Fourth Circuit where the United States' appeal on its tax claim was consolidated with the appeal of the Trustee, et al. for briefing and argument. The appeal was heard on October 4, 1977, and on December 8, 1977, the Fourth Circuit Court of Appeals, Senior Circuit Judge Bryan dissenting, reversed the judgment of the United States District Court and remanded the case for compliance with the final order of Judge Wooten. William E. Butner's petition for a rehearing was denied on January 6, 1978, and his motion for a stay of mandate pending petition for writ of certiorari to the United States Supreme Court was denied on January 16, 1978.

I.

Certiorari should be granted to resolve a split of authority among the United States Circuit Courts of Appeals which split is contrary to the provisions of the Constitution of the United States.

Article I, Section 8, Clause 4 of the United States Constitution empowers Congress "to establish... uniform Laws on the subject of Bankruptcies throughout the United States." Congress has established such a uniform law. If the Constitution orders the establishment of a uniform law, then it follows that the law must also be uniformly applied throughout the United States. At present, however, the law is not being consistently applied on the question of the right of a secured creditor to reach the rents of the encumbered property to satisfy his claims.

There is a split of authority among the circuits as to whether a secured creditor may satisfy his claim in bankruptcy out of the accrued rents of the encumbered property after the proceeds of the foreclosure

sale of that property have been exhausted. The Third and Seventh Circuits allow a secured creditor to reach the rental income. In re Pittsburg Duquesne Development Co., 482 F.2d 243, 246 (3d Cir. 1973); In re Wakey, 50 F.2d 869 (7th Cir. 1921). The Eighth and Ninth Circuits hold that the mortgagee has no right to the rents unless he has taken possession of the property, and, since a mortgagee cannot take possession of the property if the bankruptcy court has assumed control of it, in cases of bankruptcy, these circuits substitute other actions by the mortgagee in lieu of taking possession to secure his rights in the rental income. Tower Grove Bank & Trust Co. v. Weinstein, 119 F.2d 120 (8th Cir. 1941); In re Hotel Saint James Co., 65 F.2d 82 (9th Cir. 1933). These substituted acts encompass petitioning for a sequestration order, getting a receiver appointed to collect the rents or obtaining the court's consent to a foreclosure. Pollack v. Sampsell, 174 F.2d 415 (9th Cir. 1949); Mortgage Loan Co. v. Livingston, 45 F.2d 28 (8th Cir. 1930); 4A Collier on Bankruptcy (14th ed.) ¶70.16 at 150-163 (1976).

The fact that courts sitting in different circuits can reach completely contradictory results on similar fact situations clearly shows that the policy behind the Constitutional provision on uniformity of bankruptcy laws is being violated. The writers of the Constitution considered this area so vital that they proposed a complete, strictly Federal remedy to assure fair treatment to all involved in bankruptcy. Given their emphasis on uniformity, the anomalies contained in the property law of the individual states should not be allowed to create differences in application of the bankruptcy laws.

This question is of great importance today because of the new wave of bankruptcy proceedings re-

sulting from the economic dislocations of the past decade. Previously, the annual number of bankruptcies nationwide had been relatively small and the unfairness of unequal application of the law less damaging to the population in general. However, if the present split between the Circuits is not resolved, the unfairness of this unequal treatment will now affect a much larger segment of the population since the number of bankruptcies has increased.

II.

In a Bankruptcy situation the mortgageholder should be allowed to satisfy his claim from the rents of the encumbered property without having to make preliminary attempts to obtain possession of said property.

The Fourth Circuit in its opinion in the instant case adopted the rule of the Eighth and Ninth Circuits and held that Petitioner had not performed sufficient acts to establish a claim to the rents from the encumbered property. If the Court rules that the split among Circuits must be reconciled, it is submitted that the rule of the Third and Seventh Circuit Courts of Appeals on this question is the more logical in the context of bankruptcy.

The Fourth Circuit rule furthers the games-playing approach to litigation which the courts, the Congress and the legislatures of the states have been attempting to do away with by revision of the rules of civil procedure and other statutes with an emphasis on the consideration of substance over form and on the idea that a worthy claim should not be defeated by a technical rule in a situation where the rule has no rational application. Under the rule adopted here, a creditor who has not read the fine print about the split

between the circuits on this issue or whose lawyer is not highly specialized in bankruptcy law, is penalized for failing to do something which he would not have to do if the property in which he holds a security interest were located in another state. Thus differences in state rules cause unnecessary inequities in a purely Federal proceeding.

This rule is only applicable in cases where the land has depreciated in value to the point that its sale would not bring enough to cover the mortgage debt. The idea behind requiring a mortgageholder to take possession of the encumbered property before he could reach its rents to satisfy his claim is that, if the value of the land is depreciating because of the debtor's mismanagement, the taking of possession by the creditor would alleviate the problem. Thus, the deficiency would not continue to grow and some of the rents might be freed for application to other debts.

The debtor-mismanagement idea has no validity in Bankruptcy where the property is under the control and supervision of the Court. A possible justification for applying this rule in a Bankruptcy context is that, in a situation where there are many claims and few assets, it gives an indication of the diligence with which a creditor is pursuing his claim and rewards the one who pursues his claim the most vigorously. This application of the rule is unfair. By making the effort and incurring extra expense to obtain security for his debt, a secured creditor has already indicated a diligence which is not shown by the unsecured creditors. Of course there must be enough action on the part of the creditor to make it clear that he has a claim and is not waiving it, but when the newly-adopted Fourth Circuit rule is applied, it turns the Bankruptcy proceeding into a game with all the unsecured creditors waiting to pounce on the assets if a secured creditor

fails to satisfy every technical requirement along the way and ignores the fact that his original efforts to secure his debt at its inception should entitle him to some priority.

This rule discounts the importance of the income-producing capacity of the property in connection with the mortgage transaction. The ability to produce income is one variable in the determination of the value of a piece of property prior to taking a mortgage on it. If the property could not be rented or if no business could be operated thereon, the amount for which the property could be mortgaged would be less. In making a loan and taking a mortgage on real estate, the lender looks in great measure to the income being produced by the property to see if the mortgagor can make the mortgage payments from that income. The ordinary lender does not enter into a mortgage transaction with the idea that the mortgagor will be unable to repay the loan, thus making foreclosure necessary, since foreclosure is an extreme and expensive way of obtaining possession of a piece of property to satisfy a debt. Given that the income-producing ability of a piece of real estate is a prime consideration in the acceptance of a mortgage on that property as security for a loan, it seems only fair that a secured party be able to satisfy a claim in bankruptcy from accrued rents attributable to that property once the proceeds of the foreclosure sale of the property have been exhausted.

The rule adopted by the Eighth and Ninth Circuits, and now by the Fourth Circuit, assumes that a secured creditor is irrational. No rational person would purposely decide not to seek full repayment of a secured debt when he learns that his debtor is in such financial difficulty that he will be unable to pay all of his debts. By adopting this rule the Circuits are trying to penalize a secured creditor in cases where

his security, through no fault of his own, has declined drastically in value. The decline in value of the security does not diminish the amount of money that the secured creditor loaned, and he should not be penalized for value fluctuations where the rents from the property have been collected and are thus available to satisfy his claim.

III.

In holding that actions by the Petitioner during a Chapter XI proceeding to establish his right to the rental income from the property on which he held a mortgage were insufficient to establish that right in the ensuing straight bankruptcy proceeding because the Chapter XI and straight bankruptcy proceedings are not connected, the United States Court of Appeals for the Fourth Circuit committed error in that it misapprehended the nature of the two proceedings and ignored an order by the Bankruptcy Judge which would support a carryover between the two proceedings here. Certiorari should be granted so that the Court can articulate the nature of the relationship, if any, between a Chapter XI proceeding and a straight bankruptcy. In the alternative, the Fourth Circuit Court of Appeals erred in holding that actions taken before bankruptcy did not establish the Petitioner's right to the rents, and certiorari should be granted to correct the Court's interpretation of the Federal case law on this point.

Even if the Eighth and Ninth Circuit rule discussed in II above was correct, the Fourth Circuit Court of Appeals committed error in holding that the second mortgageholder had not satisfied the requirements of that rule.

The Eighth and Ninth Circuits, and now the

Fourth Circuit, when determining if a secured creditor has established his right to the rental income from the encumbered property, consider the following four factors: (1) the nature of the mortgage transaction under applicable state law; (2) the terms of the mortgage itself; (3) the acts of the parties thereunder and (4) whether equitable considerations as applied by the federal bankruptcy court may alter the result. 4A Collier on Bankruptcy (14th ed.) ¶70.16 at 157 (1976).

(1). According to North Carolina law, even after default, the mortgagor is entitled to the rents and profits of the encumbered property until the mortgagee takes possession of the property. After taking possession the mortgagee is entitled to the rents and profits. Gregg v. Williamson, 246 N.C. 356, 98 S.E. 2d 481 (1957).

(2). The terms of the mortgage itself do not address this issue and thus provide no help in determining it.

(3). Here, before Golden Enterprises began the Chapter XI proceeding, the second mortgage was not in default so the mortgagees could not have taken possession. At the time that the Bankruptcy Judge confirmed the amount of the second mortgageholders' claim against Golden Enterprises, Inc., the second mortgage was still current, so they could not have taken possession of the property at that time. In his order, the Bankruptcy Judge ordered also that the second mortgagees not attempt to file a petition to reclaim or to foreclose except upon motion to the Court. Thus, after that time the second mortgageholders could not take possession of the property without permission.

Since the property was under the control of the Bankruptcy Court, Petitioner had to perform one of

the acts which have been held to substitute for taking possession of the property where that is impossible. He satisfied this requirement by obtaining the appointment of a receiver to collect the rents. Mortgage Loan Co. v. Livingston, 45 F.2d 28 (8th Cir. 1930). The first and second mortgageholders obtained the appointment of Simon Joseph Golden to collect and hold the rents and to make payments on the mortgages. Under the order of the Bankruptcy Judge, there was no other course of action open to them.

At the time when the Chapter XI proceeding was converted into a straight bankruptcy proceeding, the Bankruptcy Judge appointed a Trustee and ordered him to collect and hold all the rents so that they might be applied "under this, or different, or further orders of this Court (emphasis supplied)." Petitioner submits that this order continued the effectiveness of the order in the Chapter XI proceeding which commanded the second mortgageholders not to attempt to reclaim or foreclose the property. Therefore, Petitioner could have done nothing more to establish his right to the rents without risking being held in contempt of court. It also continued the effect of the order appointing a receiver so that the collected rents were held in part for the same purposes as they were in Chapter XI. In addition, Bankruptcy Rule 201(a) provides that, once a Trustee has been appointed, a Receiver may only be appointed "to afford representation to the estate in an action, adversary proceeding, or contested matter when . . . the interest of the Trustee may be adverse to that of the estate." This clearly does not apply here because the mortgageholder would not have sought appointment of a receiver to represent the estate and because the Trustee's interests were not adverse to those of the estate in this situation.

The second mortgageholder was still under the order of the Bankruptcy Judge not to attempt to reclaim or foreclose on the property without permission of the Court, and his oral motions for abandonment were repeatedly denied. In addition he relied on assurances given by the Bankruptcy Judge in chambers and indicated at the first meeting of creditors that, if the property did not bring enough at the foreclosure sale to cover the first and second mortgage debts, the Judge would abandon the property to the second mortgageholders. Thus he could not file an adversary proceeding and did not think that such a proceeding was necessary under the circumstances. This was not a situation where Bankruptcy Rule 701 demands that an adversary proceeding be filed. The only applicable portion of the rule is subsection (6) "to obtain relief from a stay as provided in Rule . . . 601 . . . ." Bankruptcy Rule 601(e) states, "Nothing in this rule precludes the issuance of, or relief from, any stay . . . when otherwise authorized." The note of the advisory committee, with respect to this subsection, explains that "the stay provided by this rule is in no way a limitation on the discretion and power of the court of bankruptcy under §2a(15) of the Act to grant or deny or modify relief in the nature of an injunction."

Thus Petitioner's failure to file an adversary proceeding did not bar him from claiming the rents if his other actions were sufficient to establish a right to the rents.

The Fourth Circuit Court of Appeals held that Petitioner's acts were not sufficient to establish his right to the rents because they were not performed "during bankruptcy." (Appendix p. 36a) Petitioner submits, that, if these acts were not performed "during bankruptcy," he has established his right to the rents because, if the Chapter XI proceeding is not considered

a part of the bankruptcy, then he obtained the appointment of a receiver prior to bankruptcy. According to Collier on Bankruptcy, "If therefore, prior to bankruptcy, the mortgagee has secured possession, commenced foreclosure proceedings, secured the appointment of a receiver for the property, or has in any other manner acceptable under the mortgage and applicable state law sequestered or attached the rents and profits, it is clear under the rule just stated that the mortgagor's trustee has no rights as to such rents and profits from the property when bankruptcy ensues (emphasis supplied)." 4A Collier on Bankruptcy (14th ed.) ¶70.16 at 159-161 (1976), citing as authority Mortgage Loan Co. v. Livingston, 45 F.2d 28 (8th Cir. 1930); New Orleans Compress, Inc. v. Katz, 185 La. 723, 170 So. 244 (5th Cir. 1936); Central States Life Ins. Co. v. Carlson, 98 F.2d 102 (10th Cir. 1938); First Savings Bank v. Stuppi, 2 F.2d 822 (8th Cir. 1924).

In the alternative, Petitioner submits that the Chapter XI proceeding and the straight bankruptcy proceeding are in fact part of the same bankruptcy so that actions taken during the Chapter XI proceeding are taken "during bankruptcy" for purposes of the rule involved here.

"Once bankruptcy has begun, the mortgagee may, if he has done nothing up to that time, take the following steps to secure the rents and profits: (1) obtain from the bankruptcy court the appointment of a receiver to collect the rents for the benefit of the mortgagee...." 4A Collier on Bankruptcy (14th ed.) ¶70.16 at 161 (1976), citing as authority Tower Grove Bank & Trust Co. v. Weinstein, 119 F.2d 120 (8th Cir. 1941).

Chapter XI is only one portion of the larger Bankruptcy title of the United States Code, 11 U.S.C.

§1 et seq., and is thus encompassed thereby. Rights, duties and liabilities of creditors are the same in Chapter XI proceedings as in straight bankruptcy proceedings. 11 U.S.C. §752. If an arrangement under Chapter XI is not confirmed, the court may adjudge the debtor to be a bankrupt and direct that straight bankruptcy be proceeded with pursuant to the provisions of Title 11 of the United States Code. 11 U.S.C. §776(2). When a Chapter XI proceeding is converted to straight bankruptcy, the proceeding is handled as if the adjudication of bankruptcy was entered when the Chapter XI petition was first filed. 11 U.S.C. 778(a)(2). Thus obviously Chapter XI proceedings are on a continuum with straight bankruptcy and can be considered as a part of "bankruptcy proceedings."

Here the same Bankruptcy Judge dealt with both proceedings and the same debtors were involved in both. Thus it cannot be argued that any party lacked notice of the Petitioner's actions with respect to his second mortgage during the Chapter XI proceeding. There was no prejudicial surprise here to justify holding that the Chapter XI proceeding was not a part of the bankruptcy for purposes of establishing Petitioner's claim to the rents here.

(4). The Trustee et al. argued below that equitable considerations should bar Petitioner from reaching the rents here because he sold one of the pieces of property obtained at the Bankruptcy Resale for one million dollars. The Court of Appeals for the Fourth Circuit apparently relied on this argument to some extent in its decision below. (Appendix p. 37a) Petitioner maintained and still maintains that the question at issue was merely whether his actions had been sufficient to establish the right to reach the rents to satisfy any deficiency and not what the amount of that deficiency might be since the part of the order which

was originally appealed was that which declared him an unsecured creditor with respect to the balance of his claim. He also maintained, and still maintains, that any profit made on the later sale is not relevant to the determination of the deficiency owed. Petitioner was not the sole bidder at the bankruptcy resale; thus the final bid at the resale represents the actual value of the property encumbered by a first mortgage which was badly in arrears. Petitioner subsequently made payments on the first mortgage and eventually paid it off, thus increasing the value of the property by his own efforts. At the same time, the value of the land increased sharply because there was a warehouse on it and there was a shortage of warehouse space in the area. These intervening factors alone should account for any profit made on the sale. However, even if the deficiency owed him is reduced by the sale profits, he will still be able to establish a deficiency in the amount of at least $57,774.55 if he is adjudged to have established a right to reach the rents in question.

The property in question was sold for one million dollars. However, after he obtained possession of the property, Petitioner made payments in the amount of $839,774.55 on the outstanding first mortgage, which was greatly in arrears. Through a lawsuit for recovery of improper charges made on that mortgage and another from the same lending institution, which suit was settled in January, 1978, he recovered $5,000.00 attributable to improper charges made on the loan on the property which he sold. Thus he made a profit of no more than $165,225.45 on the sale. The original mortgage debt owed him was $360,000.00. It was reduced to $190,000.00 by virtue of his $170,000.00 bid at the bankruptcy resale. The loan carried interest at twelve percent, but the Bankruptcy Judge had reduced it to ten percent. During the Chapter XI proceeding, there was no interest paid for at least one month. This

non-payment caused Butner and the others to have a receiver appointed. After the adjudication of bankruptcy, ten monthly interest payments were missed before Petitioner obtained title to the property. At ten percent interest, this means that Petitioner did not receive $33,000.00 in interest payments to which he was entitled. Thus the unsatisfied amount of his debt after the bankruptcy resale was $223,000.00. Simple arithmetic shows that, without allowing anything for expenses incurred by the Petitioner in connection with pursuing his claim in the Bankruptcy proceeding, and without attributing any of the profit from the sale of part of the land to Petitioner's own efforts and a shift in market conditions, he is still owed at least $57,774.55 on his second mortgage. Thus, it is submitted that no equitable considerations should bar his claim to the rents.

IV.

The Fourth Circuit Court of Appeals in its decision so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision under U.S. Sup. Ct. Rule 19(1)(b), 28 U.S.C.

There is an inescapable contradiction in the opinion of the Fourth Circuit Court of Appeals here. On the one hand they rule that a Chapter XI proceeding is not a part of the Bankruptcy proceeding insofar as Petitioner is concerned in that Petitioner's actions during the Chapter XI proceeding will not carry over to secure a claim to the rents in the Bankruptcy proceeding. On the other hand, in reinstating the Order of Bankruptcy Judge Marvin R. Wooten (Appendix pp. 2a-20a), they are ruling that, insofar as Respondents are concerned, a Chapter XI proceeding is a

part of the Bankruptcy proceeding since that Order allowed priority to claims arising out of the Chapter XI proceeding. The order of Judge Wooten awarded Trustee fees of $2,088.99, attorney fees and expenses for the Trustee's attorney of $9,207.07, and a wage claim of $600.00 all of which were properly attributable to the Bankruptcy itself. It then awarded fees and expenses of $ 44,249.52 ($39,623.00 of which was incurred during the Chapter XI proceeding) to the Debtor's attorney; fees and expenses of $4,725.00 ($4,575.00 of which was incurred during the Chapter XI proceeding) to J. Carroll Abernethy; $8,000.00 (all of which was incurred during the Chapter XI proceeding) to the attorneys for the Creditors' Committee; $4,137.25 in accountant's fees (all of which was incurred during the Chapter XI proceeding); and $26,451.77 to a contractor for installing a sprinkler system in one of Golden Enterprises' buildings during the Chapter XI proceeding.

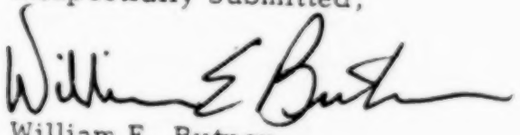
The nature of the relationship between Chapter XI and straight bankruptcy cannot fluctuate depending on whose rights are involved. The same interpretation of the relationship must be applied both to the above claimants and to the Petitioner.

This contradiction in the opinion of the Fourth Circuit Court of Appeals is obvious and cannot be resolved. Thus the United States Supreme Court should grant certiorari, exercising its power of supervision over the lower courts to remove this contradiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



William E. Butner
Attorney for Petitioner
Post Office Box 2323
Hickory, North Carolina 28601

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served a copy of the foregoing Petition for Certiorari upon counsel for the Appellants by depositing copies of the same in the United States mail, postage prepaid, addressed:

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Solicitor General
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Washington, D. C. 20530 (sent Air Mail)

This the 28th day of March, 1978.

William E. Butner

IN THE

SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1978

No. _____

IN THE MATTER OF:

Golden Enterprises, Inc., Bankrupt.

Golden Enterprises, Inc., and William E. Butner, Appellees,

v.

United States of America, Appellant.

and

IN THE MATTER OF:

Golden Enterprises, Inc., Bankrupt.

Joe Cagle, Trustee in Bankruptcy for Golden Enterprises, Inc.; Attorneys for the Creditors' Committee; James M. Gaither, Jr., Attorney for Bankrupt; Golden Enterprises, Inc., Bankrupt; William J. Lawing, C.P.A., and Charles B. Camp, Appellants.

v.

William E. Butner, Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

BANKRUPTCY NO. ST-B-73-6

In the Matter of:

GOLDEN ENTERPRISES, INC.,
Bankrupt.

ORDER

THIS CAUSE coming on to be heard before the undersigned Bankruptcy Judge on June 4, 1976, upon Notice of Final Meeting duly and properly given to the creditors of the above-named Bankrupt, to consider applications for allowances of the Trustee, the Attorney for the Trustee, the Attorney for the Debtor during the Chapter XI proceedings, the Attorneys for the Creditors' Committee, the accountant for the Debtor, and a contractor's claim during the Chapter XI, and to further consider the Trustee's objections to allowances of claims, and certain other matters relating to distribution of proceeds, and the Court having heard the evidence, the contentions of the parties, the arguments of Counsel, and having examined the Court files, hereby enters its findings, conclusions and judgment as follows:

1. That on May 4, 1973, Golden Enterprises, Inc., filed a Petition in Bankruptcy for an Arrangement under Chapter XI. The Chapter XI proceeding was somewhat unique and complex, involving many adversary proceedings, negotiations, Court hearings, liquidation of most of the Bankrupt's personal property, and the payment of more than $1,300,000.00 to creditors. Golden's assets included inventory from

its various stores located in several States with an approximate value of $700,000.00 and real estate located in Catawba County, North Carolina, with an approximate value of $2,000,000.00.

2. That there were over 700 creditors of Golden Enterprises, Inc., and a substantial number of them were located in the New York City area. The Creditors' Committee retained as its Attorneys, Arthur I. Winard and Joseph H. Frier, Jr., of New York City, and J. Carroll Abernethy, Jr., of Hickory, North Carolina.

3. That a Plan of Arrangement was proposed by the Attorney for the Debtor and the same was accepted by the requisite dollar amount and number of creditors through the efforts of the Attorneys for the Creditors' Committee. However, the Debtor was unable to obtain confirmation of the Plan due to a bank withdrawing its support from the Plan. An amended Plan of Arrangement was worked out and approved through the efforts of the Attorney for the Debtor, the Creditors' Committee and its Attorneys. This Plan was not confirmed due to a lack of funds for use as a deposit. During these negotiations, the financial statements prepared by Judd Lawing, Accountant for the Debtor, were utilized by the Attorney for the Debtor, the Creditors' Committee and its Attorneys and the Court.

4. That the Attorney for the Debtor and the Attorneys for the Creditors' Committee were directly involved in the marshalling of assets for the payment to Commercial Credit, Marine Midland Bank, and Matsushita, which payments resulted in those claims being either paid or compromised in full through liquidation or otherwise. The pleadings in those litigated matters are incorporated herein by reference.

5. That at the time the Petition under Chapter XI was filed there was a building owned by the Bankrupt on Tate Boulevard in the City of Hickory that was partially constructed but unfinished. At the time of the filing of the Petition there existed potential liens of contractors, suppliers, and lending institutions that were unsatisfied and which threatened an immediate liquidation of the Bankrupt's estate. Through the efforts of the Attorney for the Debtor, the Attorneys for the Creditors' Committee and the lien holders, a Plan was conceived and approved and implemented whereby the building (45,000 square feet) was completed and rented and the existing mortgages restructured and the real estate refinanced. The prospective tenant and the building code required a sprinkler system which was installed by Jack Sipe Construction Co. It was rented for $56,000.00 annually. Upon completion of the building and the consummation of the refinancing, claims of secured creditors and lien holders were paid or settled as follows:

a. First Citizens Bank & Trust Co. prior construction loan	$275,000.00
b. Growth Enterprises purchase money Deed of Trust	$ 70,000.00
c. Contractor labor and materials to complete	$ 70,000.00
d. Supplies labor and materials	$110,000.00
e. Taxes local ad valorem	$ 18,000.00

The above transactions worked to the direct and substantial benefit of the secured creditors, including first and second mortgage holders. Also, the above transactions were also designed to enhance the equity of the unsecured creditors in the real estate.

6. That while the Debtor was in possession numerous claims of creditors were paid or compromised through a series of Court approved proceedings and through litigation, all with assistance and cooperation of the Creditors' Committee and its Attorneys, and the secured creditors. Generated income for creditors was as follows:

Sale of Thomasville fixtures and inventory	$175,000.00
Sale or ordinary course of business of inventory (net) by Bankrupt and Commercial Credit	$300,000.00
Sale of inventory to Silverman Sales (which purchaser was found by Attorneys Winard and Frier)	$174,000.00

Additional income was generated and paid to secured creditors in the form of rent for twenty-two (22) months (May, 1973 - January, 1975) approximately $450,000.00. These sums were used to pay first mortgages on the Bankrupt's real estate and taxes, which created equity for or otherwise enhanced the position of the second mortgage holders and other creditors. The amended Plan of Arrangement made the sum of $545,000.00 available for payment of secured creditors, which sums were paid.

7. That Golden Enterprises, Inc., operated as a Debtor in possession in pursuit of a confirmation of the Plans of Arrangement during the months of May, 1973, through February, 1975. (This was a period of severe economic recession and a time when real estate values plummeted and foreclosures by lending institutions were numerous.)

8. That as a result of the time, efforts, and planning of the Creditors' Committee, its Attorneys, Attorney for the Debtor, and Jack Sipe Construction Co., the building on a portion of the Debtor's real estate was completed during the lowest point in the economic recession. If completion of the building had not been conceived and implemented, no feasible Plan of Arrangement could have been formulated for unsecured creditors. Without a feasible Plan, the Debtor would have had to convert to straight bankruptcy in late 1973 or early 1974. The real estate would have been sold then, at a time when the economic conditions of the real estate market were such that the property would not have generated enough at auction to satisfy the first lien holders in full. Thus, the diligent efforts of the above averted straight bankruptcy for the Debtor until the recession began to subside and, in so doing, substantially enhanced the value of the real estate and also increased the likelihood of the second lien holders and other creditors receiving equity from a sale of the real estate by generating rent from the improvements to reduce the balances of the first mortgages on the real estate.

9. That Golden Enterprises, Inc., was adjudged a bankrupt on February 14, 1975, and Joe N. Cagle is the duly appointed, qualified and acting Trustee in Bankruptcy.

10. That the Trustee was appointed to conduct the business of the Bankrupt. Among other things the Trustee collected the rents, found tenants for vacant rental property, conducted a sale and resale of the property which sold for more than the first mortgages outstanding thereon, and this Bankruptcy Proceeding has been regular and proper in all respects.

11. That the total receipts during this Bankruptcy Proceeding has been $167,399.17, including accrued interest on savings. The Trustee's monthly reports and final reports reflect the total disbursements of $4,427.85, which were allowed under previous orders of the Court as part of the costs of administration and which are hereby ratified, approved and confirmed. The balance on hand is $162,971.32.

12. That under Section 48 of the Bankruptcy Act, an operating Trustee is entitled to receive such commissions as may be allowed by the Court, but in no event to exceed twice the maximum allowance under normal bankruptcy proceedings. However, the Trustee only requested the normal Trustee's commissions and the same is hereby allowed in the amount of $2,088.99.

13. That Joe N. Cagle, Attorney for the Trustee, filed applications for compensation, pursuant to Bankruptcy Rule 219, for legal services rendered to the Trustee and the Bankrupt Estate, which applications are incorporated herein by reference. This Bankruptcy Proceeding was very complex as appears from the Court files, and it required a great deal of legal skills and expertise to properly serve the Trustee and the said Attorney did render the necessary legal services in a professional and competent manner. The Attorney for the Trustee provided the Trustee with valuable legal opinions and advice through every phase of this very complex and time consuming Bankruptcy Proceeding. The said Attorney conducted title examinations of the Bankrupt's real estate, which was comprised of four developed commercial properties and several vacant tracts with first mortgages on the various tracts from several different lenders and with only one second mortgage (to three parties) on all the tracts. The said Attorney

assisted the Trustee in securing tenants for the rental property. The said Attorney drafted numerous legal documents, including leases, petitions, orders and other pleadings. Among other services, the said Attorney represented the Trustee in three Adversary Proceedings and represented the Trustee at numerous Court hearings and in one Appeal. The services of Attorney Joe N. Cagle as described in the applications on file were necessary and valuable and beneficial to the Trustee and the Bankrupt Estate. The Court is of the opinion that fair and reasonable compensation should be allowed for these valuable services and further that the sum of $9,000.00 (plus expenses in the sum of $207.07) is fair and reasonable for the legal services rendered and the same is hereby allowed.

14. That James M. Gaither, Jr., Attorney for the Bankrupt, filed applications for compensation, pursuant to Bankruptcy Rule 219, for legal services rendered to the Bankrupt Estate with the Court on December 18, 1973, and on May 20, 1974, which applications are incorporated herein by reference. On June 11, 1974, the Court entered an Order awarding Mr. James M. Gaither, Jr., an attorney's fee in the amount of $34,433.75 plus expenses advanced through May 20, 1974, in the amount of $2,240.13, of which fee the sum of $9,000.00 has heretofore been paid to Mr. Gaither. The aforesaid Order is hereby ratified, approved and confirmed. Attorney James M. Gaither, Jr., is entitled to the balance due him under the said Court Order in the amount of $25,433.75 plus expenses in the sum of $2,240.13 as reasonable compensation for the legal services rendered to the Bankrupt Estate in accordance with Bankruptcy Rule 11-31 and said sums are hereby allowed as part of the costs of administration.

15. That James M. Gaither, Jr., Attorney for the Bankrupt, filed an application for compensation, pursuant to Bankruptcy Rule 219, for legal services rendered to the Bankrupt Estate since May 20, 1974, which application is incorporated herein by reference. The services of Attorney James M. Gaither, Jr., were necessary and valuable and beneficial to the Bankrupt Estate. The Court is of the opinion that fair and reasonable compensation should be allowed for these valuable services and further that the sum of $14,000.00 (plus expenses in the sum of $2,576.39) is fair and reasonable for the legal services rendered and the same is hereby allowed pursuant to Bankruptcy Rule 11-31 and as a part of the costs of administration.

16. That Attorneys, J. Carroll Abernethy, Jr., Joseph H. Frier, Jr., and Arthur I. Winard, filed application for compensation, pursuant to Bankruptcy Rule 219, for legal services rendered to the Creditors' Committee and the Bankrupt Estate, which application is incorporated herein by reference. The legal services rendered by Attorneys J. Carroll Abernethy, Jr., Joseph H. Frier, Jr., and Arthur I. Winard were valuable and beneficial to the Creditors' Committee and the Bankrupt Estate. The Court is of the opinion that fair and reasonable compensation should be allowed for the said legal services pursuant to Bankruptcy Rule 11-19.

17. That the sum of $4,625.00 (plus expenses in the sum of $100.00) is fair and reasonable for the legal services rendered by Attorney J. Carroll Abernethy, Jr., and the same is hereby allowed pursuant to Bankruptcy Rule 11-31 and as a part of the costs of administration.

18. That the sum of $8,000.00 (plus expenses in the sum of $946.76) is fair and reasonable for the

legal services rendered by Attorneys Joseph H. Frier, Jr., and Arthur I. Winard, jointly, and the same is hereby allowed pursuant to Bankruptcy Rule 11-31 and as a part of the costs of administration.

19. That Judd Lawing, Certified Public Accountant, of the firm of Lawing, Rowe & Company, filed an application for compensation, pursuant to Bankruptcy Rule 219, for accounting services rendered to the Bankrupt Estate, which application is incorporated herein by reference. The services of Judd Lawing were necessary and valuable and beneficial to the Bankrupt Estate, and the Court is of the opinion that fair and reasonable compensation should be allowed for these valuable services. The sum of $4,137.25 is fair and reasonable for the accounting services rendered by Judd Lawing and the same is hereby allowed as a part of the costs of administration.

20. That Jack Sipe Construction Co., filed an application seeking the sum of $26,451.77 for a sprinkler system which it installed in the warehouse facility constructed on the Bankrupt's property during the Chapter XI proceeding. The installation of this sprinkler system was beneficial to the Bankrupt Estate and necessary in order to complete the said facility and arrange permanent financing on the real estate, all of which was accomplished during the Chapter XI proceeding. The Court is of the opinion that the claim of Jack Sipe Construction Co., in the amount of $26,451.77 is valid and that the same should be allowed as a necessary cost and expense in the preservation of the Bankrupt Estate, and the same is hereby allowed as a part of the costs of administration.

21. That the wage and commissions claim of Charles B. Camp is hereby allowed in the sum of $600.00 and the balance of his Claim No. 465 in the

amount of $26,650.00 is hereby allowed as an unsecured claim.

22. That the correct balance owed to First Citizens Bank and Trust Company is the sum of $174,397.16. All the claims of First Citizens Bank and Trust Company (Claim Nos. 467, 143 and 192) are hereby consolidated and reduced to the sum of $174,397.16, which sum is hereby allowed as an unsecured claim.

23. That Claim No. 436 filed by Marine Midland Leasing Corp., in the amount of $108,521.47, was partially compromised, settled and paid during the Chapter XI proceeding and the same is hereby disallowed with consent of Marine Midland Leasing Corp. Claim No. 477 filed by Marine Midland Leasing Corp. in the amount of $67,495.61 is hereby allowed as an unsecured claim.

24. That Claim No. 144 filed by Jack Sipe Construction Co., in the amount of $81,248.46 is hereby disallowed, with consent of Jack Sipe Construction Co.

25. That the objection of the Trustee to the allowance of Claim No. 471 of The First National Bank of Catawba County in the amount of $48,018.98 is not contested by said creditor. The collateral was sold subject to this lien. The lien of this creditor was not disturbed or affected by the sale and it was not transferred to the proceeds. The creditor was left free to pursue and recover the collateral outside, without any interference of the Bankruptcy Court, and may subject the collateral to the satisfaction of its claim. Further, it appears that this creditor was paid or otherwise satisfied outside the Bankruptcy Proceedings. Thus, this claim is hereby disallowed in toto.

26. That the objection of the Trustee to the allowance of Claim No. 469 of Fidelity Federal Savings and Loan Association in the amount of $176,143.35 is not contested by said creditor. The collateral was sold subject to this lien. The lien of this creditor was not disturbed or affected by the sale and it was not transferred to the proceeds. The creditor was left free to pursue and recover the collateral outside, without any interference of the Bankruptcy Court, and may subject the collateral to the satisfaction of its claim. Further, it appears that this creditor was paid or otherwise satisfied outside the Bankruptcy Proceedings. Thus, this claim is hereby disallowed in toto.

27. That the objection of the Trustee to the allowance of Claim No. 464 of Shelby Savings and Loan Association in the amount of $980,507.02 is not contested by said creditor. The collateral was sold subject to this lien. The lien of this creditor was not disturbed or affected by the sale and it was not transferred to the proceeds. The creditor was left free to pursue and recover the collateral outside, without any interference of the Bankruptcy Court, and may subject the collateral to the satisfaction of its claim. Further, it appears that this creditor was paid or otherwise satisfied outside the Bankruptcy Proceedings. Thus, this claim is hereby disallowed in toto.

28. That Claims Nos. 478, 425 and 482 are duplications and actually represent only one joint claim of William E. Butner, Robert L. McKaughn, Jr., and Jack Sipe Construction Co., in the amount of $360,000.00, represented by a Note and second Deed of Trust on the Bankrupt's real estate. Pursuant to an Adversary Proceeding, the collateral was sold free and clear of this lien with the lien transferred from the property to the proceeds of the sale. The U. S. District Court allowed this creditor to bid at the sale with the amount of his

debt in lieu of putting up cash. Mr. William E. Butner (owner of the entire claim by assignment from the other two creditors) became the highest bidder at the resale of the collateral in the amount of $174,000.00. If the said mortgage holder had actually paid, this money would have been distributed to second mortgage holders, less the Trustee's commissions. Thus, none of the funds in the hands of the Trustee were derived from the sale of the collateral and the balance of this claim is disallowed as a secured claim. The Court is of the opinion that the balance of this claim in the amount of $186,000.00 should be allowed as an unsecured claim to Mr. William E. Butner and the same is hereby allowed.

29. That the Trustee has certain accounts receivable of the Bankrupt totaling $7,437.65, which he has been unable to collect. No offer to purchase the accounts receivable is available and the Court is of the opinion that the Trustee ought to be allowed to abandon the same.

CONCLUSIONS OF LAW

1. That this Bankruptcy Proceeding has been regular and proper in all respects.

2. That the services of Attorney Joe N. Cagle were necessary and valuable and beneficial to the Trustee and the Bankrupt Estate and that fair and reasonable compensation should be allowed for these valuable services and further that the sum of $9,000.00 (plus expenses in the sum of $207.07) is fair and reasonable for the legal services rendered and the same is hereby allowed as part of the costs of administration.

3. That on June 11, 1974, the Court entered an Order awarding Mr. James M. Gaither, Jr., an

attorney's fee in the amount of $34,433.75 plus expenses advanced through May 20, 1974, in the amount of $2,240.13, of which fee the sum of $9,000.00 has heretofore been paid to Mr. Gaither. The aforesaid Order is hereby ratified, approved and confirmed. Attorney James M. Gaither, Jr., is entitled to the balance due him under the said Court Order in the amount of $25,433.75 plus expenses in the sum of $2,240.13 as reasonable compensation for the legal services rendered to the Bankrupt Estate in accordance with Bankruptcy Rule 11-31 and said sums are hereby allowed as part of the costs of administration.

4. That the services of Attorney James M. Gaither, Jr., were necessary and valuable and beneficial to the Bankrupt Estate and that fair and reasonable compensation should be allowed for these valuable services and further that the sum of $14,000.00 (plus expenses in the sum of $2,576.39) is fair and reasonable for the legal services rendered and the same is hereby allowed pursuant to Bankruptcy Rule 11-31, and as a part of the costs of administration.

5. That the legal services rendered by Attorneys J. Carroll Abernethy, Jr., Joseph H. Frier, Jr., and Arthur I. Winard were valuable and beneficial to the Creditors' Committee and the Bankrupt Estate and that fair and reasonable compensation should be allowed for the said legal services pursuant to Bankruptcy Rule 11-19.

6. That the sum of $4,625.00 (plus expenses in the sum of $100.00) is fair and reasonable for the legal services rendered by Attorney J. Carroll Abernethy, Jr., and the same is hereby allowed pursuant to Bankruptcy Rule 11-31 and as a part of the costs of administration.

7. That the sum of $8,000.00 (plus expenses in the sum of $946.76) is fair and reasonable for the legal services rendered by Attorneys Joseph H. Frier, Jr., and Arthur I. Winard, jointly, and the same is hereby allowed as a part of the costs of administration, pursuant to Bankruptcy Rule 11-31.

8. That the services of Judd Lawing were necessary and valuable and beneficial to the Bankrupt Estate and that fair and reasonable compensation should be allowed for these valuable services and further that the sum of $4,137.25 is fair and reasonable for the accounting services rendered by Judd Lawing and the same is hereby allowed as a part of the costs of administration.

9. That the claim of Jack Sipe Construction Co., in the amount of $26,451.77 is valid and that the same should be allowed as a necessary cost and expense in the preservation of the Bankrupt Estate, and the same is hereby allowed as a part of the costs of administration.

10. That the wage and commissions claim of Charles B. Camp is hereby allowed in the sum of $600.00 and the balance of his Claim No. 465 in the amount of $26,650.00 is hereby allowed as an unsecured claim.

11. That the correct balance owed to First Citizens Bank and Trust Company is the sum of $174,397.16. All the claims of First Citizens Bank and Trust Company (Claim Nos. 467, 143 and 192) are hereby consolidated and reduced to the sum of $174,397.16, which sum is hereby allowed as an unsecured claim.

12. That Claim No. 438 filed by Marine Midland Leasing Corp., in the amount of $108,521.47 was partially compromised, settled and paid during the Chapter XI proceeding and the same is hereby disallowed with consent of Marine Midland Leasing Corp. Claim No. 477 filed by Marine Midland Leasing Corp. in the amount of $67,495.61 is hereby allowed as an unsecured claim.

13. That Claim No. 144 filed by Jack Sipe Construction Co., in the amount of $81,246.46 is hereby disallowed, with consent of Jack Sipe Construction Co.

14. That Claim No. 471 of The First National Bank of Catawba County, in the amount of $48,018.98 is hereby disallowed.

15. That Claim No. 489 of Fidelity Federal Savings and Loan Association, in the amount of $176,143.35 is hereby disallowed.

16. That Claim No. 464 of Shelby Savings and Loan Association, in the amount of $176,143.35 is hereby disallowed.

17. That Claim Nos. 476, 425 and 462 are duplications and actually represent only one joint claim of William E. Butner, Robert L. McKaughn, Jr., and Jack Sipe Construction Co., in the amount of $360,000.00 represented by a Note and second Deed of Trust on the Bankrupt's real estate. Pursuant to an Adversary Proceeding, the collateral was sold free and clear of this lien with the lien transferred from the property to the proceeds of the sale. The U. S. District Court allowed this creditor to bid at the sale with the amount of his debt in lieu of putting up cash. Mr. William E. Butner (owner of the entire claim by assignment from the

other two creditors) became the highest bidder at the resale of the collateral in the amount of $174,000.00. Thus, none of the funds in the hands of the Trustee were derived from the sale of the collateral and the balance of this claim is disallowed as a secured claim. The Court is of the opinion that the balance of this claim in the amount of $186,000.00 should be allowed as an unsecured claim to Mr. William E. Butner and the same is hereby allowed.

18. That the Trustee has certain accounts receivable of the Bankrupt totaling $7,437.65, which he has been unable to collect. No offer to purchase the accounts receivable is available and the Court concludes that the Trustee ought to be allowed to abandon the same.

19. That all other findings of fact are incorporated herein.

NOW, THEREFORE, it is ORDERED, ADJUDGED AND DECREED as follows:

1. That the disbursements of the Trustee in the amount of $4,427.85, which were allowed under previous orders of the Court, are hereby ratified, approved and confirmed as part of the costs of administration.

2. That the Trustee be and he is hereby allowed Trustee's commissions in the sum of $2,088.99 as a part of the costs of administration.

3. That Joe N. Cagle, Attorney for the Trustee, be and he is hereby allowed the sum of $9,000.00 as attorney's fee and the sum of $207.07 for expenses advanced, as a part of the costs of administration.

4. That James M. Gaither, Jr., Attorney for the Bankrupt, be and he is hereby allowed an attorney's fee in the sum of $25,433.75 and the sum of $2,240.13 for expenses advanced (representing the balance due Mr. Gaither under the Court Order dated June 11, 1974), as a part of the costs of administration.

5. That James M. Gaither, Jr., Attorney for the Bankrupt, be and he is hereby allowed the sum of $14,000.00 as attorney's fee and the sum of $2,576.39 for expenses advanced (for legal services rendered since May 20, 1974), as a part of the costs of administration.

6. That J. Carroll Abernethy, Jr., Attorney for the Creditors' Committee be and he is hereby allowed the sum of $4,625.00 as an attorney's fee and the sum of $100.00 for expenses advanced, as a part of the costs of administration.

7. That Joseph H. Frier, Jr., and Arthur I. Winard, jointly, Attorneys for the Creditors' Committee, be and they are hereby allowed the sum of $8,000.00 as attorneys' fees and the sum of $946.76 for expenses advanced, as a part of the costs of administration.

8. That Judd Lawing, Certified Public Accountant, Accountant for the Bankrupt, be and he is hereby allowed the sum of $4,137.25 for accounting services, as a part of the costs of administration.

9. That Jack Sipe Construction Co., be and it is hereby allowed the sum of $26,451.77 for the installation of a sprinkler system during the Chapter XI proceeding, as a part of the costs of administration.

10. That the wage and commissions claim of Charles B. Camp is hereby allowed in the sum of

$600.00 and the balance of his Claim No. 465 in the amount of $26,650.00 is hereby allowed as an unsecured claim.

11. That the correct balance owed to First Citizens Bank and Trust Company is the sum of $174,397.16. That the claims of First Citizens Bank and Trust Company (Claim Nos. 467, 143 and 192) are hereby consolidated and reduced to the sum of $174,397.16, which sum is hereby allowed as an unsecured claim.

12. That Claim No. 436 filed by Marine Midland Leasing Corp., in the amount of $108,521.47, was partially compromised, settled and paid during the Chapter XI proceeding and the same is hereby disallowed with consent of Marine Midland Leasing Corp., and that Claim No. 477 filed by Marine Midland Leasing Corp., in the amount of $67,495.61 is hereby allowed as an unsecured claim.

13. That Claim No. 144 filed by Jack Sipe Construction Co., in the amount of $81,248.46 is hereby disallowed, with consent of Jack Sipe Construction Co.

14. That Claim No. 471 of The First National Bank of Catawba County, in the amount of $48,018.98 is hereby disallowed.

15. That Claim No. 469 of Fidelity Federal Savings and Loan Association, in the amount of $176,143.35, is hereby disallowed.

16. That Claim No. 464 of Shelby Savings and Loan Association, in the amount of $980,507.02, is hereby disallowed.

17. That the balance of the $360,000.00 claim of Mr. William E. Butner, in the amount of $186,000.00

is disallowed as a secured claim and it is hereby allowed as an unsecured claim.

18. That the Trustee is hereby allowed to abandon the Bankrupt's accounts receivable as described in the Final Report.

19. That the Motion For Distribution of Funds filed by William E. Butner is hereby denied.

20. That except as hereinabove modified and amended, the Final Report of the Trustee is hereby approved, ratified and confirmed.

This the 1st day of July, 1976.

Marvin R. Wooten
U. S. Bankruptcy Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

Bankruptcy Number ST-B-73-6

In Re:

GOLDEN ENTERPRISES, INC.,
Bankrupt.

MEMORANDUM AND ORDER

This matter is before the Court upon an appeal from an order of the Bankruptcy Court dated and entered on July 1, 1976, whereby William E. Butner was found to be an unsecured creditor of the Bankrupt, Golden Enterprises, Inc. The appellant contends that his claim should be given secured status and paid in full out of funds received by the Trustee from rents and profits derived from real estate upon which he held a second mortgage.

The appeal was heard at the August 1976 term at Statesville and after a careful examination of the records and a consideration of the briefs and oral arguments, the Court now enters its findings and conclusions.

On May 4, 1973 Golden Enterprises, Inc., filed a petition in bankruptcy for an arrangement under Chapter XI of the Bankruptcy Act. A plan was never confirmed and the Bankrupt operated as a Debtor in possession from the date of filing until February 14, 1975, when it was adjudged a bankrupt and a Trustee was appointed. During the pendency of the petition under Chapter XI and upon the application of the attorney for the Bankrupt, Simon Joseph Golden was

appointed by the Bankruptcy Court as Agent to collect the rents from the real estate owned by Golden Enterprises, Inc., and to disburse the proceeds to the payment of (1) federal and state income taxes; (2) monthly payments to first mortgages; (3) ad valorem property taxes; (4) fire insurance premiums, and (5) interest and principal on second mortgages. After the straight bankruptcy adjudication the Trustee took charge of the real estate and collected the rents. During the administration of the Bankrupt's estate the Trustee collected some $167,309.17 in rents and accured interest, of which $162,971.32 remains on hand after authorized disbursements. The question in controversy here is who gets these funds, the holder of the second mortgage, or the bankrupt's estate? If it goes to the estate, the bulk of it will be used to pay court costs and attorney fees.

At all times pertinent to this appeal the appellant, William E. Butner, together with Robert L. McKaughn, Jr., and Jack Sipe Construction Company, held a second mortgage on real estate owned by the Bankrupt securing an indebtedness of $360,000.00. By assignment, Butner is the sole owner and holder of the note and is entitled to any recovery had thereon. Pursuant to an adversary proceeding the real estate was ordered sold subject to the first mortgage but free and clear of the second mortgage, with the lien of the second mortgage being transferred from the property to the proceeds of the sale. By the terms of the order Butner was permitted to bid on the property at the sale the amount of his debt in lieu of a cash bid. At the sale he became the last and highest bidder for the property with a bid of $174,000.00, leaving a balance of $186,000.00 unsatisfied.

The Bankruptcy Judge found that the appellant's bid and purchase of the property extinguished his

secured claim, and that the balance due on his note would constitute nothing more than an unsecured claim. The Judge reasoned that had the appellant actually submitted a cash bid, the money would have been distributed to him as the holder of the second mortgage, less the Trustee's commissions and the cost of sale, thereby extinguishing the secured debt.

Since there appears to be no dispute as to the facts, the sole question for determination by this Court is whether the Bankruptcy Judge erred in his holding that as a matter of law the appellant's secured claim does not extend to the income derived from the rental of the real estate during bankruptcy administration.

There appears to be considerable disagreement between the Circuit Courts of Appeals on this issue. In Fidelity Bankers Life Insurance Co. v. Williams, 506 F.2d 1242 (4th Cir. 1974), Chief Judge Haynsworth stated:

> "Some courts, notably the Third and Seventh Circuits, hold that a secured creditor may recover the rental income. See, e.g., In re Pittsburgh-Duquesne Development Co., 482 F.2d 243, 246 (3d Cir. 1973); Central Hanover Bank & Trust Co. v. Philadelphia & Reading Coal & Iron Co., 99 F.2d 642 (3d Cir. 1938); In re Wakey, 50 F.2d 869 (7th Cir. 1921). Those courts view the issue as a contest between the secured creditors and the unsecured ones for whom the bankruptcy court operates the estate. Since the rental income is additional security for the mortgage loan, the Third and Seventh Circuits equitably shift the income from the unsecured to the secured creditors.
>
> "Other courts of appeals, including the Eighth

and Ninth Circuits, reject this approach. E.g., Tower Grove Bank & Trust Co. v. Weinstein, 119 F.2d 120 (8th Cir. 1941); In re Hotel Saint James Co., 65 F.2d 82 (9th Cir. 1933); see In re Humeston, 83 F.2d 187 (2d Cir. 1936). Those authorities have found that the mortgagee has no right to the rents because, under the mortgage terms, state courts require the mortgagee to take possession in order to fix his right to the rents. A mortgagee, however, cannot take possession and collect rents once the bankruptcy court has assumed control of the property. Accordingly, those courts substitute other actions to secure rights in the rental income for the contractual entry of possession and collection of rents. If the mortgagee has petitioned the bankruptcy court for a sequestration order, obtained the appointment of a receiver to collect the rents, or secured the court's consent to foreclose, the Eighth and Ninth Circuits allow him to recover the rental income during the bankruptcy administration. See, e.g., Pollack v. Sampsell, 174 F.2d 415 (9th Cir. 1949); Mortgage Loan Co. v. Livingston, 45 F.2d 28 (8th Cir. 1930); 4A Collier, supra, § 70.16, at 161-63."

The issue in Williams was identical with the question here but the Court determined that the mortgagee was entitled to the rents on the basis of a provision in the mortgage and thereby did not reach and decide our basic issue. However, the Court did go far enough to blaze some trails to head us in the right direction when it held that:

> "Although Fidelity pursued its abandonment petition, it did not take the steps required by the Eighth and Ninth Circuits to fix its right to

the rental income. Its failure to take action, however, has not caused difficulty in ascertaining the amount of the net rental income from operating the property. Nonetheless, the supplemental agreement between Fidelity and O'Neil removes this case from the primary area of dispute between the other courts of appeals. That agreement assigned the income to Fidelity without requiring it to take possession of the building." (Page 1243)

It thus appears that the Court of Appeals for the Fourth Circuit would follow the approach of the Eighth and Ninth Circuits. In following this approach four factors should be taken into consideration: (1) the nature of the mortgage transaction under applicable state law; (2) the terms of the mortgage itself; (3) the acts of the parties thereunder, and (4) whether equitable consideration as applied by the federal bankruptcy court may alter the result. 4A, Collier on Bankruptcy, § 70.16 (1976).

Under North Carolina law a mortgagor is deemed to be the owner of the land subject to the debt, and even after default, he is entitled to rents and profits from it until the mortgagee takes possession. Gregg v. Williamson, 246 N.C. 356, 98 S.E.2d 481 (1957); Kistler v. Development Co., 205 N.C. 755. 172 S.E. 413 (1934); Parker Co. v. Bank, 204 N.C. 432, 168 S.E. 681 (1933).

In Kistler v. Development Co., supra, the court held:

"In the absence of a stipulation to the contrary a mortgagor of real property who is permitted to retain possession is entitled to the rents and profits. Credle v. Ayers, 126 N. C., 11. As

between the mortgagor and the mortgagee equity makes the mortgage a charge upon the rents and profits when the mortgagor is insolvent and the security is inadequate (Carr v. Dail, 114 N. C., 284), but the prevailing rule is that a mortgagee is not entitled to rents until entry is made or a suit for foreclosure is begun. Killebrew v. Hines, 104 N. C., 182; Parker Co. v. Bank, 204 N.C. 432. In the latter case it was held that the mortgagee's right to collect the rents and income of mortgaged property arises only after the mortgagee or trustee has taken possession either by consent or by an order or decree of the court. There a receiver had been appointed in an action for the foreclosure of the mortgage and as the amount realized from a sale of the property was not sufficient to pay the mortgage debt the rents were properly applied in payment of the deficiency."

The question then arises as to whether the appellant, the mortgage holder, took the necessary steps to obtain possession of the property or to foreclose his mortgage. He contends that he and the holders of the first mortgages attempted to no avail on numerous occasions to get the bankruptcy court to abandon the real estate to them so they could proceed to foreclose. As it turned out, the real estate when sold at public sale did not sell for enough to pay the secured claims and therefore, in retrospect, it appears that the property should have been abandoned to the secured creditors. This was not done, and it was sold by order of the bankruptcy court. It was necessary for the appellant to appeal to this Court in order to obtain the right to use his note in connection with his bid on the property covered by his mortgage at the sale ordered by the Bankruptcy Judge and conducted by the Trustee.

As already noted by the Court, on April 17, 1974, James M. Gaither, attorney for the Debtor, moved for the appointment of an agent or receiver to collect the rental income from the real estate and to apply the same to the payment of taxes, mortgage payments, and insurance. In his Motion, Mr. Gaither states:

> " . . . That several secured parties including Shelby Savings and Loan Association, Jack Sipe Construction Company, William E. Butner, and Robert L. McKaughn, Jr., as well as the Creditors' Committee, have requested that the income derived from rentals, as well as the books and records of the company with regard to its real estate, be placed in the hands of a court-appointed individual with directions to collect the rents, make all mortgage payments, pay taxes, insurance, and repairs and accumulate excess cash flow for the benefit of secondary lienholders and the unsecured creditors."

It therefore appears to this Court that the appointment of Mr. Golden to collect the rents was in effect the appointment of a receiver as authorized under Rule 201 of the Rules of Bankruptcy Procedure. The files show that this appointment resulted from the request of the secured creditors, including the appellant, Mr. Butner, who were attempting to apply these funds to the claims they held against the Debtor. Admittedly, the Trustee was subsequently appointed in February of 1975, thereby terminating the appointment of the receiver but the Trustee continued to collect these rents and profits, and to hold them in accordance with the original order. It would have been an exercise in futility for the appellant to have moved for the appointment of a receiver to collect and sequester these rents since that was already being done.

It therefore appears that the appellant did all that he could do to obtain possession of the property and proceed to foreclosure as well as to have the rents collected and sequestered, and has met the requirements set forth in Williams, Parker Co. and Development Co. supra, necessary to extend his secured status to the rents from the property.

Turning to the second and third factors which should be considered, the Court finds nothing in the terms of the mortgage or in the acts of the parties to aid in the determination of this issue.

The final factor is whether equitable consideration as applied by the bankruptcy court may alter the results. The Court finds no difficulty in determining that equity requires that rents collected under the circumstances of this case should go to the secured lienholders rather than to the unsecured creditors. However, in this case it appears to be a contest between the holder of the second mortgage on the one hand, and the trustee and attorneys for the Bankrupt and Creditors Committee on the other hand. The attorneys admitted at the hearing that the court costs, the trustee and attorney fees as approved by the bankruptcy court would consume most of the rental funds collected and on hand. The files disclose that the bankrupt's estate owned sizeable quantities of personal property, and the Court is at a loss to understand why the bulk of the costs and fees has been relegated for payment out of the rents from the real estate.

It is an accepted rule that in a bankruptcy sale free of liens and encumbrances the proceeds are chargeable with the actual cost of the sale plus costs reasonably incurred in the preservation of the property and the portion of the administration expenses

that may be properly attributed to the sale. However, the lien holder cannot be charged with additional expenses or the general cost of administration of the bankrupt's estate such as costs of operating the business or the expenses and losses thereof. Collier's Volume 4-A at Page 1223.

In the instant case, the Court has found that the appellant's secured status extended to the rents and profits derived from the property during the administration of the bankrupt's estate. Applying the aforementioned rule to this finding, it would be improper to charge these rents with the fees and costs of the entire estate approved by the Bankruptcy Judge. Therefore, it is the opinion of this Court that the case should be remanded on this point for a determination of the cost of sale and of the costs reasonably incurred in the preservation of this property. Also, a finding should be made as to what administrative expenses are properly attributable to this sale. It is the conclusion of this Court that only these amounts are properly chargeable against these rents, and that the balance is rightfully owing to the appellant under his security interest.

IT IS, THEREFORE, ORDERED that the Bankruptcy Judge's finding of the appellant's unsecured status as to the rents derived from the encumbered property at issue during the bankruptcy be, and the same is hereby reversed and vacated, and the case is remanded for a determination of what costs and fees are properly chargeable against these rents.

The Court has by separate findings and Order directed the payment of the sum of $26,451.77 to Jack Sipe Construction Company as the sum due and payable for the completion of a building on the real estate. This work was done by order of the Bankruptcy Court

and by consent of these parties and inured to the benefit of the creditors, secured and unsecured.

This the 12th day of November, 1976.

Woodrow W. Jones
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(Argued October 4 - decided December 8, 1977)

Docket Nos. 77-1138 and 77-1151

Golden Enterprises, Inc., and William E. Butner v. United States of America

and

Joe Cagle, Trustee in Bankruptcy for Golden Enterprises, Inc., et al. v. William E. Butner

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BRYAN, Senior Circuit Judge; WINTER and THOMSEN (sitting by designation), Judges.

Joe N. Cagle (Cagle and Houck on brief) and James M. Gaither, Jr., and (J. Carroll Abernethy, Jr., on brief) for Appellants in 77-1151.

Carleton D. Powell, Attorney, Department of Justice Tax Division (Gilbert E. Andrews & Crombie J. Garrett, Attorneys, Department of Justice Tax Division; Myron C. Baum, Acting Assistant Attorney General and Keith S. Snyder, United States Attorney on brief) for Appellant in 77-1138.

William E. Butner for Appellee in 77-1138 and 77-1151.

WINTER, Circuit Judge:

The question we must decide is which of the mortgagee or the bankrupt estate is entitled to rents realized from mortgaged property between the time of the mortgagor's bankruptcy and foreclosure of the

mortgage. On the facts before us, we hold that they go to the bankrupt estate. We reverse the district court and reinstate the disposition made by the bankruptcy judge.

I.

Golden Enterprises, Inc. (Golden) was the owner of several parcels of real estate located in North Carolina on which first mortgages were given to several financial institutions and a second mortgage given to William E. Butner and others, whose interests Butner later acquired, to secure a debt of $360,000. Golden filed a petition in bankruptcy for an arrangement under Chapter XI of the Bankruptcy Act (11 U.S.C. §§ 701-799). It operated as a debtor in possession for a time, but a plan of arrangement was never confirmed. On February 14, 1975, the proceeding was transformed into a liquidating bankruptcy.

While the Chapter XI petition was pending, the bankruptcy court appointed an agent to collect Golden's rents and to apply them to the payment of the taxes, insurance, interest and principal payments due on the mortgages. When the straight bankruptcy ensued, the trustee collected the rents. The trustee made some authorized disbursements from the rents he collected. By direction of the bankruptcy court, however, he made no payments on the mortgages. After the authorized disbursements, the sum of $162,971.32 remained in the hands of the trustee and it is the fund which is the subject of this appeal.

The mortgages did not provide any security interest for the mortgagees in the rents. The mortgages were in default by the time that Golden was adjudicated bankrupt. At the first meeting of creditors,

Butner requested that the property be abandoned to him subject to the first mortgages. The trustee was willing to accede to Butner's request, and the trustee suggested this procedure as one of several alternatives for winding up the bankruptcy since there were substantially no other assets for general creditors. He also suggested, as another alternative, a sale or foreclosure by him as trustee of the second mortgage--that is, a sale subject to the first mortgages with the lien of the second mortgage transferred to the proceeds of the sale. When the bankruptcy judge indicated a preference for the latter, the trustee formally sought and obtained authority for a public sale subject to the first mortgages, with the rights of other lienholders transferred to the proceeds of sale. Although the property sold, the district court, upon Butner's appeal, ordered a resale of the property with permission to Butner, if he was the successful bidder, to make payment by satisfying the debt due him in lieu of cash. Butner was the successful bidder at the second sale. The amount of the debt due him at that time was $360,000. He bid $174,000 for the properties and paid for them by consuming part of the debt due him, leaving a balance of $186,000 of the amount secured by his second mortgage unsatisfied.

The deed from the trustee to Butner provided that "[t]he accrued rents and the right to collect unpaid accrued rents from [the subject property] are hereby expressly not conveyed, but are reserved to the [trustee]." Although Butner never requested that the rents be sequestered for his benefit prior to the sale, he claimed, before the bankruptcy judge, that the unsatisfied debt due him ($186,000) should be given secured status and paid from the fund of net rents collected after bankruptcy was adjudicated. The bankruptcy judge rejected the contention and ruled that the order of sale transferred the lien of the

second mortgage to the proceeds of sale and that Butner should be treated as a general creditor with respect to his unsatisfied security interest. The district court, however, ruled that, notwithstanding the absence of a provision in the second mortgage relating to rents before foreclosure and Butner's failure to seek a sequestration of the rents for his benefit, Butner was entitled to the fund. It reached this conclusion on both legal and equitable grounds.

The trustee and creditors, including the United States (with claims for unpaid taxes amounting to approximately $50,000), appealed. We think the bankruptcy judge was correct. We therefore reverse the district court's order and remand for reinstatement of the bankruptcy judge's determination.

II.

The question of a secured creditor's right to income generated by the secured property during bankruptcy has produced a split of opinion among the circuits. Although we have not ruled on this issue, a recent opinion by Judge Haynsworth in Fidelity Bankers Life Insurance v. Williams, 506 F.2d 1242, 1243 (4 Cir. 1974), ably summarizes the two competing theories:

> Other courts of appeals have disagreed about whether a lien creditor is entitled to the income from property during bankruptcy administration. . . . Some courts, notably the Third and Seventh Circuits, hold that a secured creditor may recover the rental income . . . . Those courts view the issue as a contest between the secured creditors and the unsecured ones for whom the bankruptcy court operates the estate. Since the rental income is additional security

for the mortgage loan, the Third and Seventh Circuits equitably shift the income from the unsecured to the secured creditors.

> Other courts of appeals, including the Eighth and Ninth Circuits, reject this approach . . . . Those authorities have found that the mortgagee has no right to the rents because, under the mortgage terms, state courts require the mortgagee to take possession in order to fix his right to the rents. A mortgagee, however, cannot take possession and collect rents once the bankruptcy court has assumed control of the property. Accordingly, those courts substitute other actions to secure rights in the rental income for the contractual entry of possession and collection of rents. If the mortgagee has petitioned the bankruptcy court for a sequestration order, obtained the appointment of a receiver to collect the rents, or secured the court's consent to foreclose, the Eighth and Ninth Circuits allow him to recover the rental income during the bankruptcy administration. See, e.g., Pollack v. Sampsell, 174 F.2d 415 (9th Cir. 1949); Mortgage Loan Co. v. Livingston, 45 F.2d 28 (8th Cir. 1930); 4A Collier, supra § 70.16, at 161-63.

We now align ourselves with the Eighth and Ninth Circuits. Their view seems preferable because it best ensures that the outcome in federal court will parallel the result that would obtain in state court had bankruptcy proceedings not been instituted. We look to see what Butner's rights were under state law and whether he took steps which are the analogue of what state law requires.

III.

Under North Carolina law, absent a special provision giving the mortgagee a right to receive the rents, a mortgagee must take possession of the mortgaged property in order to be entitled to the rents which issue therefrom. Gregg v. Williamson, 246 N.C. 356, 98 S.E.2d 491 (1957); Kistler v. Development Co., 205 N.C. 755, 1972 S.E. 413 (1934); Killibrew v. Hines, 104 N.C. 182 (1889). Butner's second mortgage gave him no right to the rents before foreclosure, and because of the bankruptcy he did not, of course, take possession of the mortgaged property. We turn then to the steps he took before the trustee's sale.

The record reflects no request by Butner during bankruptcy for a sequestration of rents or for the appointment of a receiver. The district court found that such a request "would have been an exercise in futility . . . since that was already being done," but this statement is erroneous. Of course, there had been a receiver until the adjudication in bankruptcy and he had applied the rents collected, inter alia, to the payment of interest and principal on the mortgages. But the adjudication of bankruptcy and the appointment of a trustee terminated the prior receivership, Bankruptcy Rule 201 (a), and thereafter the trustee collected the rents for the bankrupt estate. Moreover, he was specially instructed by the bankruptcy court not to make any mortgage payments. Manifestly, what the district court thought was being done was not being done; and had Butner desired it to be done, it was incumbent on him to make a specific request for the appointment of a receiver and the sequestration of rents.

Similarly, the record reflects no formal action on the part of Butner to proceed with foreclosure in

compliance with Bankruptcy Rule 701. He had, of course, made several informal requests that the property be abandoned, but when they were not granted he pursued the matter no further. Indeed, he made such a request of the bankruptcy judge at a time after the adjudication, when approximately $50,000 in rents had been collected by the trustee; but at that time he stated he would waive any claim to the accrued rents. When the trustee formally requested authority to sell the property, Butner was made an adversary party to the request. He filed no answer, although he could have requested abandonment, permission for him to foreclose under state law, or a determination of the priority of his lien on the rents. In short, we can find no sufficient indicia that Butner would have proceeded to assert a security interest in the rents had bankruptcy not ensued.

IV.

The district court, in reversing the order of the bankruptcy judge, stated, "the Court finds no difficulty in determining that equity required that rents collected under the circumstances of this case should go to the secured lienholders rather than to unsecured creditors." The difficulty that we have is that the district court failed to articulate the equitable considerations that it thought required the result that it reached.

Our examination of the record does not persuade us that there is any significant equitable consideration which requires a resolution of the dispute in favor of one party over another. Butner ostensibly lost on his second mortgage. Yet we are told that he has profited from ultimate disposition of the property. If the fund inures to the benefit of the bankrupt estate, it may well be, as the district court feared, that it will be largely consumed by attorneys' fees; yet the record reflects

that substantial legal services were performed.

We therefore think that the decision should proceed from the legal considerations discussed in Parts II and III hereof. If equity has a part in the resolution of a question of this type--an issue on which we express no view--equity does not supply the answer here.

REVERSED AND REMANDED.

Albert V. Bryan, Senior Circuit Judge, dissenting:

I would affirm on the discriminating opinion of the District Judge, In Re: Golden Enterprises, Bankrupt, No. ST-B-73-6 (November 16, 1976).

Despite the recital of other reasons, the majority decision actually turns on the single axis: that appellee, the second mortgagee, failed to renew "during bankruptcy" a request made during the arrangement phase for a sequestration of rents for his benefit. The term "bankruptcy" is used in its technical reference to the stage of the case after adjudication of bankruptcy upon failure of the arrangement plan.

I.

This point was initially made at trial by the appellants, but overruled by the District Judge for the reason that the requirement of a second request would have been the exaction of a procedure he deemed futile, that is, useless as unnecessary "since that was already being done", i.e., it had been sought and ordered by the Bankruptcy Judge. But the majority terms this statement erroneous because, although this had occurred in the arrangement proceeding, the request had not been renewed after the adjudication, hence

not "during bankruptcy". The facts, I think, sustain the District Judge and reveal the majority as sacrificing substance to form, for in regard to the request and order, there was no such decisive break in the two stages of the case as to warrant this sacrifice.

On May 4, 1973, the petition for an arrangement was filed by Golden Enterprises and on June 27, 1973 Joe N. Cagle was appointed "standby trustee", that is, to serve as trustee in bankruptcy in the event of the failure of the arrangement plan, as authorized by the statute, 11 USC 738. Thereafter, April 17, 1974, the Debtor's attorney moved the Bankruptcy Judge "for an Order appointing a named individual to function as agent in collecting rental income of Golden Enterprises, Inc. and applying the funds to those debts approved for payment by this Court". The next day the order was entered naming Simon Joseph Golden as agent "to collect rents and to apply the proceeds under the supervision of the Court". Among the applications so ordered was one to the "5. Interest and principal on secondary mortgages" which, of course, included appellee Butner's mortgage. Further, the agent was directed not only to file monthly reports to the Court, but also to the "second mortgage holders", of his receipts, expenditures and "accumulations".

No modification of this order occurred before the adjudication of bankruptcy which was made 10 months later, February 14, 1975. Therein Joe N. Cagle was appointed trustee of the property of the Debtor. As heretofore noted, he had been named earlier to occupy this position and did so throughout the filing of the request for an agent to collect rents and the use of them towards payment of the principal and interest of the second mortgage. Highly significant, moreover, is that the trustee after adjudication was directed, inter alia, "to collect and receive all

rents . . . and to hold and retain all moneys thus received to the end that the same may be applied under this or different orders of this Court . . . ." This included, of course, the sequestration order--as a "different" order--for it emanated from the same court in a component of the same suit.

True, Bankruptcy Rule 201 provides that the appointment of a receiver (agent here) shall be terminated when the trustee qualifies. However, this termination does not wipe out the request for the sequestration; nor does it annul the order for the application of the rents to the second mortgage. Only the collector is changed, but that change would not alter the rights of a creditor which were fixed by an order during the arrangement stage. The agent would simply be supplanted by the trustee. The first order has equal standing, by virtue of 11 USC 752, of any order entered in a voluntary bankruptcy case after adjudication, and a petition for an arrangement is the equivalent of a petition for voluntary bankruptcy. 11 USC 752 and 778(a)(2). Thus this order remained intact and no reassertion of it was demandable.

With deference I suggest that the majority misconceives the operation of the arrangement provisions, contending that what is ordered during that period is vacated or nullified by the subsequent adjudication. As just mentioned this is gainsaid by the statute, §752, declaring that an order passed therein before adjudication, has the same standing as one passed in a voluntary bankruptcy after adjudication. In truth, there is but a single proceeding. The arrangement phase is simply a prefatory consideration in relation to bankruptcy. The same petition at once serves both; the trustee for both is chosen at the commencement of the arrangement; and both are simultaneously considered by the Bankruptcy Judge. Hence orders are

frequently common to both.

II.

Appellee Butner is chided in the majority opinion for not taking "formal action" to obtain foreclosure of his mortgage by an adversary proceeding under Bankruptcy Rule 701. Likewise, he is taken to task for not filing an opposing answer to the trustee's application to sell the property. Both of these reprovals are extinguished by the fact that, as the majority earlier noted, Butner had already asked for abandonment of the property to him subject to prior mortgages. It was in this context that he stated he would waive any claim, as the majority would point up; manifestly, his business judgment taught that the abandonment of the property to him was more advantageous than the benefits to be derived from the rentals. Instead of ordering abandonment, the trustee obtained authorization to sell the property at public auction, which he did. Surely, again, further action by Butner would have been futile.

III.

Finally, the proposed opinion notices the District Judge's statement that "the Court finds no difficulty in determining that equity required that rents collected under the circumstances of this case should go to the secured lienholders rather than to unsecured creditors". Rather than to dispose of the considerations in the mind of the District Judge by simply referring to his failure to articulate these equities, I would remand for a hearing on them. Particularly in respect to equities, I would not charge Butner with any success he may have had with the property after he had bought it and it was out of the case.

For the foregoing reasons I cannot join in the majority opinion.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Docket Nos. 77-1138 and 77-1151

Golden Enterprises, Inc., and William E. Butner v.
United States of America

and

Joe Cagle, Trustee in Bankruptcy for Golden Enterprises, Inc., et al. v. William E. Butner

---

ORDER

Upon consideration of the appellee for a petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Winter with the concurrance of Judge Thomsen. Judge Bryan dissents.

For the Court,
William K. Slate, II
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Docket Nos. 77-1138 and 77-1151

Golden Enterprises, Inc., and William E. Butner v.
United States of America

and

Joe Cagle, Trustee in Bankruptcy for Golden Enterprises, Inc., et al. v. William E. Butner

---

ORDER

Upon consideration of a motion of the appellee, for stay of mandate pending application to the United States Supreme Court for a writ of Certiorari,

IT IS ORDERED that the motion is DENIED.

For the Court - by Direction.
William K. Slate, II
Clerk

Supreme Court, U. S.
FILED
JUL 26 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

Volume One
Pages 1a-404a

IN THE

SUPREME COURT OF THE UNITED STATES

Fall Term, 1978

No. 77-1410

William E. Butner, Petitioner,

vs.

United States, et al., Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Certiorari Filed April 4, 1978
Certiorari Granted June 12, 1978

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BANKRUPTCY DOCKET

Name of Bankrupt: GOLDEN ENTERPRISES, INC.

1234 S. Center St.

Hickory, Catawba County, N. C.

District No. 419, Division No. 5, Docket No. 73-0006

Chapter XI, Date Petition Filed: 5-4-73, Voluntary

Occupation: Merchant and Real Estate

Name of Judge: Woodrow W. Jones

Name of Referee: Joseph R. Cruciani

Attorney for Bankrupt: James M. Gaither, Jr.

P. O. Box 2323

Hickory, N. C. 28601

322-5505

Trustee: Joe Cagle

P. O. Box 2050

Hickory, N. C. 28601

704-322-2207

Attorney for Trustee: Joe Cagle

P. O. Box 2050

Hickory, N. C. 28601

Date	Proceedings
5-4-73	File Petition in Proceedings for An Arrangement pursuant to Chapter XI of the Bankruptcy Act, in triplicate. File list of petitioner's creditors and their addresses, and a summary of petitioner's assets and liabilities, with a statement of the location of said assets.
5-7-73	Sending two copies of above papers to Referee in Bankruptcy. Copy of all above papers also sent to Treasury Department, Washington, D.C., and IRS, Greensboro, N. C.
5-15-73	Affidavit of Proposed Attorney
5-15-73	Application to Employ Attorney

5-16-73	Application for further time to file statement of executory contracts schedules and statement of affairs
5-16-73	Application to Stay Suits
5-16-73	Application to Restrain William Grooh and Request for Show Cause hearing
5-16-73	Application for Authority to Operate Business
5-16-73	Application to Stay Enforcement of Liens
5-16-73	Order that William Grooh is restrained from further action
5-16-73	Order Authorizing Operation of Business
5-16-73	Order Staying Suits - until the first meeting of creditors - at which time hearing shall be held appropriate orders entered regarding the continuation of the restraining order

5-16-73	Notice to show cause served by Marshal's office on William Grooh
5-16-73	Hearing on ratifying and confirming sale of Thomasville & Shelby stores
5-18-73	Certificate of Mailing - Notice of Sale and Arrangement
5-21-73	Petition to Sell Assets and To Ratify Prior Sale of Assets
5-22-73	Temporary Order Regulating Operation of Debtor's Business
5-22-73	Special Appearance for Purpose of Objecting to Jurisdiction
5-22-73	Hearing on Show Cause - William Grooh
5-22-73	Order Appointing James M. Gaither, Jr., as Attorney for the Debtor
5-24-73	Referee's Proceeding Memo (William Grooh)
5-24-73	Order Staying Wm. Grooh & Concerning Golden Enterprises in Georgia

5-24-73	Motion by U. S. Attorney Keith S. Snyder
5-29-73	Civil Action - Attachment - Assets Ordered Released and Turned Over
5-30-73	Hearing to Ratify & Confirm Sale at Thomasville & Shelby
5-31-73	Referee's Proceeding Memo (Thomasville Confirmed - Shelby cont'd.)
6-4-73	Order regarding sale of assets & etc., in building on real property known as Southgate Shopping Center, Thomasville, N. C.
6-11-73	Expense of Proceeding for an Arrangement filed by William Grooh
6-14-73	Cash Projection - Commercial Real Estate
6-14-73	Unaudited Financial Statements
6-14-73	Application to Employ Accountant
6-18-73	Order Authorizing Appointment of Accountant

6-18-73	Order Staying Enforcement of Liens
6-18-73	Application to Reclaim Property of Matsushita Electric & Order to Show Cause
6-18-73	Affidavit of Service - W. T. Covington, Jr.
6-27-73	First Meeting of Creditors
6-27-73	Special Statements as of May 4, 1973
6-28-73	Referee's Proceeding Memo (1st Meeting)
6-28-73	Notice to Trustee of His Appointment
6-29-73	Creditors Committee
6-29-73	Order for Transfer of Assets from California to North Carolina
7-9-73	Affidavit of Service - Wayne Paul Huckel (App. to Reclaim and Order to Show Cause by Matsushita Electric Corpo. of America)
7-16-73	Order Appointing The Official Creditors Committee

7-18-73	Affidavit of C. Roland Splawn, Credit Manager of Matsushita
7-18-73	Hearing on Pet. to Reclaim of Matsushita Electric
7-18-73	Order Concerning Inventory Marked "Panasonic" & Order to File Written Response to Petition within 30 days
7-19-73	Referee's Proceeding Memo (Hearing on Pet. to Reclaim)
7-20-73	Petition
7-20-73	Notice and Order to Show Cause
7-20-73	Certificate of Mailing
7-24-73	Hearing on Order to Show Cause (Order Withdrawn w/consent of counsel)
7-24-73	Referee's Proceeding Memo (Order to Show Cause)
8-15-73	Application for extension of time to file plan and the meeting of creditors to be held at a later date

8-15-73	Application for a new lease to be entered into
8-15-73	Consent of creditors' committee to the approval of the lease by the court
8-15-73	Order allowing the new lease to be entered into
8-15-73	Order allowing until September 10, 1973, to file a proposed plan of arrangement with this Court
8-15-73	Preliminary Plan of Reorganization
8-17-73	Answer of Commercial Credit to Petition to Reclaim of Matsushita
8-20-73	Notice of Hearing on Petition to Reclaim of Matsushita
8-24-73	Order regarding Commercial Credit Business Loans, Inc., Secured creditor (the suppliers of goods to Golden Enterprises, Inc., are ordered to show cause by Sept. 6, 1973.

8-24-73	Order Commercial Credit Business Loans, Inc., regarding certain creditors
8-24-73	Order - nunc pro tunc as of July 24, 1973
9-10-73	Plan of Arrangement
9-12-73	Hearing on Pet. to Rec. Panasonic Equip. filed by Matsushita
9-12-73	Ref. Pro. Memo (Pet. to Rec. of Matsushita, Decision by 10-10-73)
9-18-73	Amended Page 1 of Note A in Plan of Arrangement (Inserted in Plan)
9-25-73	List of Exhibits (Matsushita's Pet. to Reclaim Panasonic Equip.)
9-25-73	Hearing on Confirmation or Rejection of Plan (Cont'd. to 10-10-73)
9-25-73	Ref. Pro. Memo (Conf. or Rejection of Plan)
10-10-73	Hearing on Conf. or Rejection of Plan

10-10-73	Ref. Pro. Memo (Conf. or Ref. of Plan - Cont'd. to 10-25-73)
10-18-73	Cert. of Mailing (Mr. Golden) of Hearing on Conf. or Rejection of Plan
10-23-73	Order Allowing MECA to examine inventory of the Debtor and to Allow the Debtor to Extinguish its Debt to MECA in accord with MECA's security interest in "panasonic" items
10-25-73	Cont'd. Hearing on Conf. or Rejection of Plan (Cont'd. from 10-10-73)
10-25-73	Ref. Pro. Memo (Cont'd Hearing on Conf. or Rejection of Plan)
10-25-73	Creditors' Consents to Plan
10-30-73	Motion for Authorization for First Citizens to execute note & deed of trust
11-5-73	Mot. for Authorization for First Citizens to Execute Note & Deed of Trust

11-5-73	Order Authorizing First Citizens to Execute Note & Deed of Trust
11-21-73	Petition For Allowances By Co-Counsel to Creditors' Committee
11-29-73	Appl. for Extension of Time to File Appl. for Confirmation
11-29-73	Appl. for Extension of Time to File Appl. for Attys Fees (Gaither)
11-30-73	Order Allowing Ext. of Time to File Appl. for Conf.
11-30-73	Order Allowing Ext. of Time to File Appl. for Attys Fees
11-26-73	Appl. for Fees - Lawing, Rowe & Co. (Certified Public Accountants)
12-11-73	Amended Plan Filed by Debtor and Attorney
12-19-73	Application for fee for Attorney for the debtor
12-28-73	Application for Extension of Time to file Application for Confirmation

1-2-74	Application of Matsushita Electric Corporation of America for further relief on purchase money security interest in Panasonic merchandise
1-3-74	Order to Show Cause on Application filed 1-2-74 by MECA and hearing set for 1-15-74 at 2:00
1-3-74	Certificate of Mailing - Notice of Hearing 1-15-74 - order and application
1-4-74	Conference Hearing in Chambers Re: Payment to Commercial Credit to be made by 1-15-74
1-14-74	Petition by Shelby Savings and Loan Association for Order to Pay Deed of Trust
1-15-74	Order that Shelby Savings Association be Allowed to Pay on Deed of Trust
1-15-74	Reply To Application of Matsushita Electric Corporation of America for Further Relief

1-15-74	Motion for an Extension of Time For Confirmation or Chapter X
1-15-74	Hearing on Confirmation (not confirmed and continued)
1-15-74	Referee's Proceeding Memo - Hearing on Confirmation
1-15-74	Hearing on MECA's Petition for Relief on Purchase Money Secur. Interest
1-15-74	Referees' Proceeding Memo - Hearing on MECA (Panasonic)
2-14-74	Hearing on Confirmation and Progress Report (continued to 4-17-74)
2-14-74	Judges' Proceeding Memo in Hearing on Confirmation and Progress Report
2-14-74	Statement of Executory Contracts
2-14-74	Statement of Affairs
2-14-74	Motion for an order allowing an amendment to the Plan of Arrangement for the purpose of substituting second mortgagees

2-14-74	Order allowing amendment to Plan of Arrangement substituting second mortgagees
2-14-74	Motion for extension of time and continuance of confirmation hearing for 90 days
2-14-74	Ordered that confirmation hearing be continued to 4-17-74 at 2: 00
2-14-74	Offer to Operate Store and Liquidate Inventory Assets
2-14-74	Oath to List of Creditors (attached to list of creditors filed 5-4-73)
3-13-74	Report of Atty. for Debtor on claims and acceptances
3-27-74	Application to Stay Suits until final decree herein
3-27-74	Order staying suits until final decree
4-17-74	Adjourned confirmation hearing
4-17-74	Judges' Proceeding Memo re adj. confirm. hearing (continued)

4-17-74	Motion by Atty. for Debtor for order re rights of Shelby Savings and Loan in event of default
4-17-74	Motion by Atty. for Debtor and Robert L. McKaughn, Jr., Wm. E. Butner, Jack Sipe Construction for order relating to terms of the secondary deed of trust securing the debt of Golden Enterp.
4-17-74	Motion by Attorney for Debtor re appointment of attorneys for creditors' committee
4-17-74	Ordered that Shelby Savings and Loan have certain rights re lien in event of bankruptcy and that it not be prevented from pursuing other legal rights after application to this court
4-17-74	Ordered that note and deed of trust to Butner, McKaughn, Jr., and Jack Sipe Construction be at interest of

	10% and that parties must apply to this court for any amendment thereto or reclamation
4-17-74	Order appointing Joseph Frier, Jr., Arthur Winard and J. Carroll Abernethy, Jr. as attorneys for the creditors' committee
4-17-74	Motion by Atty. for Debtor for appointment of agent to collect rents
4-18-74	Order appointing Simon Joseph Golden as agent to collect rents, to post $40,000.00 bond, report monthly, and to segregate funds collected
4-18-74	Order Appointing Disbursing Agent James M. Gaither, Jr.
4-22-74	Memorandum of Agreement between Silverman Sales Enterprises, Inc. and Golden Enterprises, Inc. re sale of inventory, fixtures and supplies at Hickory and Shelby stores

4-22-74	Application to sell parcel of real estate and to negotiate for such sale of that real estate
4-22-74	Order to sell real estate upon approval of Court and Creditors' Committee
4-24-74	Order allowing Debtor to accept offer of Silverman to buy inventory, fixtures and supplies and Debtor's atty. to file adv. proceed. against secured creditors
4-26-74	Application to sell property free and clear of liens (inventory, etc.)
4-26-74	Order allowing sale and that time to answer complaint to sell free and clear be shortened to ten days
4-26-74	Complaint of Debtor vs Commercial Credit Business Loans, Inc., Marine Midland Leasing Corporation, U.S.A. (Treasury Department), Employment Security Commission of the State of

	NC, Employment Security Commission of the State of GA, NC Department of Revenue to sell free and clear (A-1)
4-29-74	Summons and Notice of Trial and Affidavit of Service (A-1)
5-8-74	Answer of Director of the Employment Security Agency, State of GA, to complaint of Debtor to sell free and clear of liens (A-1)
5-9-74	Answer of Commercial Credit Business Loans, Inc. to complaint of Debtor and certif. of service (A-1)
5-9-74	Answer of North Carolina Dept. of Revenue to complaint of debtor and certif. of serv. (A-1)
5-9-74	Answer of the Employment Security Commission of North Carolina to the complaint of debtor and cc of letter to debtor's atty. (A-1)

5-10-74	Answer by IRS to complaint of Debtor to sell free and clear and certif. of service (A-1)
5-13-74	Order Approving Agent's Bond
5-13-74	Affidavit and consent to be made party to adversary proceeding filed by Creditors' Committee (A-1)
5-13-74	Motion by Attorney for the Debtor to add creditors' committee (A-1)
5-13-74	Ordered that Debtor be allowed to amend its complaint adding creditors' committee as a defendant (A-1)
5-13-74	Trial on Complaint of Debtor vs secured creditors (A-1)
5-13-74	Judges' Proceeding Memo of Trial continued to 5-29-74, 2:00
5-14-74	Answer of Marine Midland Leasing to Complaint of Debtor (A-1)
5-14-74	Certificate of Mailing of notice to parties of continued trial (A-1)

5-14-74	Certificate of Service by Marine Midland of Answer filed 5-14-74 (A-1)
5-14-74	Notice by Marine Midland of retaining Kennedy, Covington, Lobdell & Hickman as local counsel (A-1)
5-17-74	Application for Extension of Time to File Applications for Compensation for Atty. for Debtor and Attys. for Cred. Comm. to 5/24/74
5-17-74	Request (letter form) of Attys. for Cred. Comm. to have till 6/10/74 to file application for fees
5-20-74	Notice of Hearing on Fees
5-20-74	Certificate of Mailing by JMG on 5/17/74 of Notice of Hearing on Fees
5-21-74	Order allowing Debtor's atty. and Cred. Comm. atty. till 5/24/74 to file applications for fees
5-22-74	Amendment to Complaint of Debtor re priority of liens (A-1) adding

	Creditors' Committee as Defendants (notice and service waived per affidavit 5/13/74)
5-28-74	Application for extension of time to file application for fees and expenses by attorney for debtor
5-28-74	Order allowing attorney for debtor until 5/28/74 to file application for fees and expenses
5-28-74	Application for fees and expenses by attorney for the debtor (suppl.)
5-28-74	Disbursement Order allowing Jack Sipe Construction Co. to begin completion of Phase II of Tate Blvd. realty, Golden to furnish architect's certificate to Shelby Savings and Loan, then Shelby Savings and Loan to disburse, upon completion of construction and receipt of architect's certificate, to 1st Citizens $250,000.00, to Butner &

	Gaither $1964.50, ad valorem taxes and remainder to Jack Sipe Construction Co., and other conditions re Jack Sipe Construction, Wm. Butner and Robt. McKaughn, Jr., note and deed of trust from Golden Enterprises, Inc.
5-28-74	Application for Fees by Lawing, Rowe & Company accountants
5-29-74	Supplement to Petition for attorney's fees for the attorneys of creditors' committee
5-29-74	Application for allowance of rent as an administrative expense under sect. 64 filed by Marine Midland Leasing
5-29-74	Judgment and Order in matter of Debtor vs secured creditors (A-1) that Comm. Credit have 1st priority in matter of proceeds of sale of store inventory

5-29-74	Trial on Complaint of Debtor vs secured creditors to determine priority of liens
5-29-74	Judges' Proceeding Memo
5-29-74	Hearing on Applications for Fees
5-29-74	Judges' Proceeding Memo
5-29-74	Complaint of Debtor vs 1st Citizens Bank & Trust Company and E. Murray Tate, Jr., Trustee; William E. Butner and Robert L. McKaughn, Jr. and James M. Gaither, Jr., Trustee; Tax Collector of the City of Hickory; Tax Collector of Catawba County; Creditors' Committee of Golden Enterprises, Inc.; North Carolina Department of Revenue; United States of America (Treasury Department, Internal Revenue Service); Employment Security Commission of The State of North Carolina; Jack Sipe Construction

	Company to sell 2 real estate lots free and clear of liens (A-2)
5-30-74	Summons and Notice of Trial and Affidavit of Service (A-2)
5-30-74	Certificate of Mailing of Judgment and Order (A-1)
5-31-74	Answer of NC Dept. of Revenue to amended complaint (A-1) and certif. of service
6-4-74	Answer of USA-IRS to complaint of Debtor vs secured creditors to sell realty free and clear of liens (A-2) and certif. of service
6-5-74	Agent J. Golden's report for May, 1974
6-7-74	Answer of ESC of NC to complaint of Debtor (A-2)
6-10-74	Answer of NC Dept. of Revenue (A-2)
6-10-74	Affidavit in support of application for fees and expenses of atty. for debtor

7-18-74	Order allowing debtor till Nov. 14th to file application to confirm and make deposit
7-26-74	Motion by atty. for debtor for allowance of execution of subordination agreement making lease between Golden and Superior Continental superior to deed of trust between Shelby S & L and debtor
7-26-74	Order allowing debtor, Shelby Savings and Loan and Superior Continental to execute subordination agreement re lease
7-26-74	Hearing on Debtor's motion for extension of time to file objection to claim of Marine Midland
7-26-74	Judges' Proc. Memo
7-26-74	Affidavit of Michael J. Rudick of Marine Midland re price of NCR equipment

	Enterprises in settlement of A-1 complaint of Debtor vs secured creditors for determination of liens
7-8-74	Consent judgment of Debtor and Marine Midland Leasing Corp. that Marine be allowed to reclaim NCR equipment and that the secured claim of Maine Midland be reduced accordingly in settlement of A-1 complaint of Debtor vs secured creditors for the determination of liens
7-17-74	Application to extend time for deposit and for filing application to confirm to November 14th, 1974
7-17-74	Debtor's Motion to extend time for filing objection to claim of Marine Midland Leasing Corporation
7-17-74	Notice of Hearing on Motion to file objection (hand delivered to Marine Midland's atty.)

6-10-74	Application for interim allowance of compensation and reimbursement of expenses by atty. for debtor
6-10-74	Affidavit as to division of fees by atty. for debtor
6-11-74	Order allowing fees and expenses of atty. for debtor to 7/17/74
6-13-74	Supplemental petition for allowances by co-counsel for creditor's committee
6-14-74	Adj. trial in matter of Debtor vs secured creditors to sell inventory free and clear of liens from 5-29-74
6-14-74	Judges' Proc. Memo
6-14-74	Trial on debtor's complaint to sell realty free and clear
6-14-74	Judges' Proc. Memo
7-8-74	Consent Judgment of Debtor and Marine Midland Leasing Corp. that trade fixtures and equipment be sold along with the inventory by Silverman Sales

7-26-74	Order allowing Marine Midland to sell the reclaimed NCR equip. for $8,400.00 unless upset bid of at least $9,240.00 is received by 7/31/74 at 5:00
8-1-74	Affidavit of Atty. for Debtor re fees and expenses
8-1-74	Hearing on interim fees for atty. for debtor
8-1-74	Ref. Proc. Memo
8-2-74	Objection of debtor to claim of Marine Midland Leasing
8-2-74	Notice of Hearing on objection to be held 8-22-74
8-7-74	Statement of Cash Receipts and Disbursements by Agent Golden for month of July, 1974
8-12-74	Notice of Motions and Motions filed by atty. for Marine Midland re debtor's objection to Marine Midland's claim

8-20-74	Motion in the Cause in Adversary Proceeding to sell inventory
8-20-74	Notice of Motion in the Cause
8-20-74	Amendment to objection to allowance of claim of Marine Midland
8-22-74	Brief of Atty. for Debtor re attorneys fees payable from proceeds of sale of inventory
8-22-74	Hearing on objection to claim of Marine Midland
8-22-74	Ref. Proc. Memo
8-22-74	Order allowing interim compensation to attorney for the debtor
8-22-74	Judgment and Order compromising and settling the amount of the claim of Marine Midland Leasing Corp.
9-4-74	Statement of cash receipts and disbursements from agent for August
9-20-74	Debtor's objection to William Grooh's (claim) for rent as administrative

	expense
9-30-74	Motion in the Cause to pay appraisal from proceeds of Shelby S & L loan
10-2-74	Order allowing Shelby Savings and Loan to pay appraisal
10-3-74	Monthly report of Joe Golden, agent
11-4-74	Statement of Cash Receipts and Disbursements - Oct. 1 to Oct. 31, 1974
11-5-74	Description of Lease Agreements
11-5-74	Monthly Income From Leases
11-5-74	Description of Mortgages
11-13-74	Motion of debtor to continue deposit due date from 11-14-74 and for alternative relief
11-13-74	Certificate of Mailing of Notice of hearing on objection to claim of William Grooh
11-14-74	Notice of hearing to show cause why case should not be converted to straight bankruptcy

11-18-74	Request of Admissions filed by Atty. for Wm. Grooh
11-29-74	Reply to request for admissions and certif. of service
12-5-74	Affidavit of James M. Gaither, Jr., Attorney for Debtor
12-5-74	Hearing for debtor to show cause why motion to extend time should be granted and case should not be converted to straight bankruptcy
12-5-74	Ref. Proc. Memo
12-5-74	Hearing on objection to claim of William Grooh for rent as cost of administration
12-5-74	Ref. Proc. Memo
12-11-74	Statement of receipts and disbursements of agent, Joe Golden
12-20-74	Application of debtor to pay part of ad valorem taxes from disbursing agent's account

12-30-74	Order disallowing Application to pay ad valorem taxes from disbursing agent's account
12-30-74	Application for dismissal or conversion
12-31-74	Notice of Hearing on Indemnification mailed
1-6-75	Statement of Cash Receipts and Disbursements for Dec.
1-15-75	Notice of change of date of indemnity hearing
1-22-75	Indemnity hearing
1-22-75	Ref. Proc. Memo (bond due 2-5-75)
2-3-75	Agent's report for January
2-3-75	Income analysis from Reule Investment Company
2-3-75	Schedule of monthly expenditures, income and excess cash flow
2-6-75	Transcript of hearing on objection to claim of Wm. Grooh

2-10-75	Order and notice of hearing on adjudication or dismissal
2-12-75	Transcript of Dec. 5, 1974 hearing
2-14-75	Hearing on adjudication or dismissal
2-14-75	Ref. Proc. Memo
2-14-75	Adjudication order
2-14-75	Order authorizing appointment of trustee and operation and fixing bond
2-14-75	Report of Bankruptcy Case Change
2-18-75	Trustee's Bond
2-19-75	Order Approving Trustee's Bond
2-19-75	Petition for Authorization to Act as Own Attorney
2-24-75	Trustee's monthly financial report
2-25-75	Order allowing trustee to act as own attorney
2-27-75	Amended financial report for Feb.
3-20-75	Monthly Financial Report submitted by Joe N. Cagle, Trustee

3-25-75	Schedule of Assets
4-1-75	Petition of trustee for authorization of trustee to enter into lease
4-3-75	Accounting of Disbursement Account
4-3-75	Statement of affairs (mortgages)
4-3-75	Statement of Affairs (leases)
4-4-75	Trustee's Inventory
4-4-75	Trustee's Statement of Assumed Contracts
4-7-75	Order for authorization of trustee to lease property
4-10-75	Statement of unpaid debts incurred by debtor in possession after commencement of XI
4-16-75	1st Meeting after conversion from XI
4-16-75	Ref. Proc. Mem
4-16-75	Trustee's Recommendations as to sale of assets
4-16-75	Trustee's Petition for authorization to waive appraisals and exhibits

4-16-75	Trustee's monthly financial report for April
4-16-75	Trustee's petition for authorization to enter into lease
4-16-75	Order allowing trustee to enter into lease
4-30-75	Order to waive appraisals
5-20-75	Monthly Financial Report of trustee for May
5-27-75	Complaint of 1st Citizens Bank and Trust Co. vs Trustee to recover property
6-4-75	Judgment by consent allowing recovery of property by 1st Citizens Bank and Trust
6-11-75	Complaint of Trustee vs Shelby Savings and Loan Association and Joseph C. Whisnant, First National Bank of Catawba County and James M. Gaither, Jr., Fidelity Federal Savings and

	Loan Assoc. and Lee Dennis, W. E. Butner, Robert L. McKaughn, Jr., Jack Sipe Construction Co. and J. Carroll Abernethy, Jr., Employment Security Commission of N. C., Catawba County Tax Collector and City of Hickory Tax Collector to sell Realty free and clear of liens
6-12-75	Order reducing time to answer to 10 days
6-12-75	Summons issued
6-17-75	Certificate of Mailing of Notice of last day to file claims for XI debts
6-19-75	Answer of City of Hickory Tax Collector
6-23-75	Monthly financial report by trustee for June
6-24-75	Answer of Complaint to sell real estate and transfer certain liens to proceeds

	of sale (answer of Joseph Whisnant, Trustee, and Shelby Savings & Loan Association)
6-24-75	Acceptance of service by Joseph Whisnant, Trustee, and Shelby Savings & Loan Association
6-25-75	Answer of Fidelity Federal Savings and Loan Association and Lee Dennis as Trustee
6-25-75	Certificate of Service by William R. Sigmon, attorney for Fidelity Federal Savings & Loan Association and Lee Dennis, Trustee, on Joe N. Cagle
6-25-75	Answer of First National Bank of Catawba County and James M. Gaither, Jr., as Trustee
6-25-75	Certificate of Service of answer on Joe N. Cagle, by William R. Sigmon, attorney for First National Bank of Catawba County and James M. Gaither,

	Jr., Trustee
6-26-75	Summons and Notice of Trial and Affidavit of Service on Employment Security Commission of North Carolina
6-26-75	Acceptance of Service by Robert L. McKaughn, Jr.
6-26-75	Acceptance of Service by William E. Butner
6-26-75	Acceptance of Service by W. George Huffman, Esq. as Attorney for Jack Sipe Construction Co.
6-26-75	Acceptance of Service by Gerald Fleming, Catawba County Tax Collector
6-26-75	Acceptance of Service by Arthur Millers, City of Hickory Tax Collector
6-26-75	Acceptance of Service by J. Carroll Abernethy, Jr.

6-26-75	Acceptance of service by James M. Gaither, Jr.
6-26-75	Acceptance of Service by William R. Sigmon, attorney for Fidelity Federal Savings & Loan Association and Lee Dennis as Trustee
6-26-75	Acceptance of Service by William R. Sigmon as attorney for First National Bank of Catawba County and James M. Gaither, Jr., as Trustee
6-27-75	Answer of James M. Gaither, Trustee and Certificate of Service of Answer on Golden Enterprises
6-30-75	Trial of trustee vs Shelby Savings and Loan and Joseph C. Whisnant, 1st National Bank of Catawba County and James M. Gaither, Jr., et al to sell free and clear
6-30-75	Ref. Proc. Memo

6-30-75	Order allowing trustee to sell free and clear on 7-28-75
7-21-75	Monthly Financial Report for July, 1975
7-22-75	Notice of Sale dated July 10, 1975 and Certificate of mailing dated July 14, 1975
7-22-75	Petition for authorization of trustee to enter into lease
7-25-75	Order for authorization of trustee to lease property
8-1-75	Application for fees for attorneys for creditors' committee
8-4-75	Affidavit of trustee re sale
8-11-75	Order confirming sale in part and allowing trustee to proceed with private sale of unconfirmed tracts
8-15-75	Petition for fees for attorney for creditors' committee - Abernethy
8-18-75	Affidavit as to fees - Gaither

8-18-75	Application for fees by attorney for debtor in possession
8-19-75	Financial report from trustee for August, 1975
8-19-75	Motion of William E. Butner for amendment and alteration of judgment and motion for a new hearing and certificate of service
8-19-75	NOTICE OF APPEAL TO THE DISTRICT COURT and certificate of service by appellant
8-20-75	Motion for stay pending appeal of order confirming sale
8-22-75	Notice of appeal mailed to James Gaither, Jr., Joe Cagle, George Huffman, C. B. Cash, Jr., William R. Sigmon, and J. Carroll Abernethy Jr.
8-25-75	Petition in the cause by trustee regarding confirmation of private

	sales and hearing thereon
8-28-75	Amendment to Motion for amendment and alteration of judgment and motion for a new hearing
8-29-75	Order denying motion for stay pending appeal and advising amount of supersedeas bond if stay allowed on appeal to district court
8-29-75	Order denying motion to alter or amend confirmation order of sale and motion for a new hearing
9-2-75	Certificate of mailing of notice of hearing on confirmation of sales
9-4-75	Transcript of 1st meeting after conversion from Chapter XI 4-16-75
9-3-75	Motion of William E. Butner for stay pending appeal - Judge Jones
9-3-75	Affidavit of William E. Butner
9-3-75	Order staying enforcement of confirmation order pending appeal by

	Judge Jones
9-3-75	Certificate of service of motion and order
9-10-75	DESIGNATION OF RECORD ON APPEAL
9-10-75	Certificate of service of designation
9-12-75	Motion in the Cause by Shelby Savings and Loan Assoc. for recovery of real property
9-16-75	Transcript of 2-14-75 hearing on dismissal or conversion
9-17-75	LETTER OF TRANSMITTAL OF RECORD ON APPEAL TO CLERK'S OFFICE IN ASHEVILLE
9-18-75	Certificate of Mailing of Letter of Transmittal
9-17-75	Notice of Hearing on Appeal
9-18-75	Certificate of Mailing re Notice of Hearing on Appeal
9-22-75	Trustee's petition to deposit funds in savings account for 30 days

9-30-75	Monthly financial report for September
9-30-75	Brief of Trustee
10-2-75	Order Allowing Deposit of Funds in Savings Account
11-3-75	Monthly Financial Report, October, 1975
11-7-75	ORDER OF JUDGE JONES re appeal by Wm. Butner of 8-11-75 order confirming sale, ordering resale by trustee for 11-12-75 and, if the proceeds are not sufficient to cover the principal of the Second Deed of Trust, the Trustee shall forthwith abandon the realty, and the proceeding is remanded for further proceedings in accordance with the order of Judge Jones
11-21-75	Copy of Trustee Deed from Joe N. Cagle to William E. Butner & wife
11-21-75	Assignment from Jack Sipe Construction Co. to Butner & wife

11-21-75	Assignment from Robert L. McKaughn, Jr. to Butner & wife
12-1-75	Motion for Distribution of Funds filed by J. Richardson Rudisill, Jr.
12-2-75	Monthly Financial Report filed by Trustee
12-11-75	Petition for Authorization of Trustee to Store Bankrupt's Records
12-31-75	Notice of Hearing on William E. Butner's Motion for Distribution of Funds
12-31-75	Cert. of Mailing - Notice of Hearing on Butner's Motion
12-31-75	Order for Authorization of Trustee to Store Bankrupt's Records
1-16-76	Complaint of Bekins Moving & Storage Co. vs. Trustee to recover property
1-16-76	Answer of Trustee re: Bekins Moving & Storage Co. vs. Trustee
1-20-76	Affidavit under Rule 219 filed by Trustee

1-20-76	Trustee's Petition for Attorney's Fees
1-30-76	Consent Judgment re: Bekins Moving & Storage Co. vs. Trustee
2-18-76	Objection to Allowance of Claims filed by Trustee
2-20-76	Supplemental Petition for Attorney's Fees
2-20-76	Petition for Private Sale of File Cabinets
2-23-76	Trustee's Final Report
3-9-76	Order for Private Sale of File Cabinets without notice to creditors
4-2-76	Trustee Amended Final Report
5-12-76	Notice of Final Meeting
5-17-76	Certificate of Mailing - Notice of Final Meeting
5-25-76	Answer to Objection to Allowance of Claims by First Citizens Bank and Trust Co.

5-25-76	Additional Objection to Allowance of claim of Charles B. Camp to be heard on Final Meeting on June 4 at 9:30 am
6-4-76	Final Meeting of Creditors, Hearing on Trustee's Objections to Claims, and Hearing on Trustee's Final Report
6-4-76	Proceeding Memo
6-4-76	Brief In Support of Application for Fees by the Attorney for the Debtor
6-14-76	Trustee's Receipts and Disbursements Since Date of Final Report
7-1-76	Order as Follows: (1) Disbursements for Cost of Administration is Approved (2) Trustee's Commission is Allowed (3) Fees for the Attorney for the Trustee are Allowed (4) Fees for the Atty. for the Bankrupt are Allowed (5) Expenses for the Attorney for the Bankrupt are Allowed (6) Fees for the Attorney for the Creditors Committee

be Allowed (7) Additional Attorney's for the Creditors Committee have their Fees and Expenses Allowed (8) Accountants Fee be Allowed (9) Jack Sipe Construction Co. be Paid (10) Wages and Commissions of Charles B. Camp be Allowed (11) Claims of First Citizens Bank & Trust be Allowed (12) Claim #436 by Marine Midland Leasing Corp. is Disallowed and Claim #477 by same Co. is Allowed (13) Claim #144 by Jack Sipe Construction Co. is Disallowed (14) Claim #471 by The First National Bank of Catawba County is Disallowed (15) Claim #469 by Fidelity Federal Savings and Loan Assoc. is Disallowed (16) Claim #464 of Shelby Savings and Loan Assoc. is Disallowed (17)

Balance of Claim by William E. Butner is Disallowed as Secured and Allowed as Unsecured (18) Allowing Trustee to Abandon Accounts Receivable (19) Motion for Distribution of Funds presented by William E. Butner is Denied (20) Confirmation of Final Report of Trustee

7-9-76	Notice of Appeal to District Court
7-9-76	Designation of Record on Appeal
7-9-76	Certificate of Service by Mail - Notice of Appeal and Designation of Record on Appeal
7-19-76	Transcript of Final Meeting of Creditors Held 6/4/76
7-21-76	Letter of Transmittal of Appeal - Final Meeting of Creditors
7-21-76	Certificate of Mailing - Letter of Transmittal

2-18-75	Filing Report of Bankruptcy Case
	Change from Chapter XI to Straight
	Bankruptcy as of 2-14-75
9-3-75	Filing Motion for Stay Pending Appeal
	Affidavit of William E. Butner
	Order Staying Enforcement of Con-
	firmation Order Pending Appeal
	BANKRUPTCY ORDERS V-I, P-37
	Certificate of Service
	Attorney Rudisill's letter of September
	2, 1975, to Judge Jones
	(Above papers sent to Bankruptcy
	Judge)
9-9-75	Appeal bond of $500.00 deposited in
	Registry Account of this Court R 63626
11-7-75	Filing Order re Appeal of William E.
	Butner from the Confirmation Order
	of the U. S. Bankruptcy Judge en-
	tered on August 11, 1975. Bankruptcy
	Orders V-1, P-38

11-12-76	Filing Affidavit of Joe N. Cagle,
	Trustee and J. Carroll Abernethy,
	Jr., Attorney for Creditors Committee,
	and Supplemental Report of the Court.
	Copy sent directly to Judge Jones by
	Attorney Cagle
11-15-76	Filing Affidavit of William E. Burton,
	Vice-President of Jack Sipe Construc-
	tion Company
11-15-76	Filing Order by Judge Jones affirm-
	ing Bankruptcy Judge's order dated
	July 1, 1976, authorizing and ap-
	proving the payment of the claim of
	Jack Sipe Construction Co. in the
	amount of $26,451.77, and authorizing
	the trustee to make payment to Jack
	Sipe Construction Co. in the amount
	of $26,451.77 as payment in full and
	discharge of the claim of Jack Sipe

Construction Company. Bankruptcy Orders V-I, P-39

11-16-76 Filing MEMORANDUM AND ORDER ordering that the Bankruptcy Judge's finding of the appellant's unsecured status as to the rents derived from the encumbered property at issue during the bankruptcy be, and the same is reversed and vacated, and the case is remanded for a determination of what costs and fees are properly chargeable against these rents. Copies to Bankruptcy Judge and attorneys of record. Bankruptcy Orders V-I, P-40. Copy also to Mr. L. Bruce Locke, U. S. Dept. of Justice

11-17-76 Filing C/S as to Order filed 11-15-76. All parties served by Attorney George Huffman

12-15-76 Filing Notice of Appeal by the Trustee in Bankruptcy for Golden Enterprises, Inc., the attorneys for the Creditors' Committee, the attorney for the bankrupt, the bankrupt, William J. Lawing, C.P.A., and Charles B. Camp, from the order of Woodrow W. Jones dated Nov. 12, 1976, and filed in the Office of the Clerk on November 16, 1976. Copies to Clerk, U. S. Court of Appeals for the 4th. Circuit, L. Bruce Locke, William E. Butner, Jack Sipe Construction Co.

12-15-76 Filing Personal Bond on Appeal secured by Cash Deposit. $250.00 deposited in Registry Fund of this Court R73120.

Re:

Bankruptcy No. ST-B-73-6

Golden Enterprises, Inc.

INDEX TO APPEAL RECORD

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The bankruptcy files are filed as Exhibit 1 and Volume II

RECORD ON APPEAL

VOLUME II

Re:

Bankruptcy No. ST-B-73-6

GOLDEN ENTERPRISES, INC.

The following bankruptcy files are designated as Exhibit 1. These files are the record designated for the appeal to the U. S. District Court:

Bankruptcy Docket and Claims Register

File No. 1

File No. 2

File No. 3

File No. 4

File No. 5

File No. 6

File No. 7 - XI

File No. 7 - 4

File No. 8

File No. 8 - 4

File No. 9

Adversary Proceeding File A1

Adversary Proceeding 2

Exhibits Received 5-22-73 - Show Cause - William Grooh

Claim File 5

Claim File 6

Claim File 11

Claim File 12

File With U. S. claims nos. 264 and 422

United States of America

Western District of North Carolina

I, J. Toliver Davis, Clerk of the United States District Court for the Western District of North Carolina, do hereby certify that the above files are the files received from the Bankruptcy Office as the record designated for appeal to the District Court in ST-B-73-6 - Golden Enterprises, Inc.

They are being sent to you in two boxes, and under separate cover.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Statesville this _____ day of February, 1977.

J. TOLIVER DAVIS, CLERK

By

Martha E. Rives, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

ST-B-73-6

IN THE MATTER OF:

GOLDEN ENTERPRISES, INC., Debtor

IN PROCEEDINGS FOR AN ARRANGEMENT

PETITION

TAX IDENTIFICATION NO. 56-0929458

TO THE HONORABLE JOSEPH R. CRUCIANI, REFEREE IN BANKRUPTCY:

The petition of Golden Enterprises, Inc., 1234 South Center Street, Hickory, Catawba County, North Carolina, and engaged in the real estate and retail business, respectfully represents:

1. Your petitioner is a business corporation organized and existing under the laws of the State of North Carolina and is a corporation which could become a bankrupt under the Bankruptcy Act, and is not a

municipal, railroad, insurance or banking corporation, or building and loan association.

2. Your petitioner has had its principal place of business at 1234 South Center Street within the above Judicial District for a longer portion of the six months immediately preceding the filing of this petition than in any other Judicial District.

3. Your petitioner has conducted business in the following areas: Golden Enterprises, Inc. Real Estate Division, Golden Enterprises, Inc. Premium Division, and Golden Enterprises, Inc. Retail Division.

4. Your petitioner is the owner of the real estate listed on Exhibit A attached hereto.

5. Your petitioner leases retail outlets and other property as described on Exhibit B attached hereto.

6. No bankruptcy proceeding, initiated by a petition by or against your petitioner, is now pending.

7. Your petitioner is unable to pay its debts as they mature.

8. Your petitioner intends to propose an arrangement pursuant to the provisions of Chapter XI of the Bankruptcy Act.

9. Attached hereto is a list of your petitioner's creditors and their addresses, and a summary of your petitioner's assets and liabilities, with a statement of the location of said assets.

10. Simultaneously with the submission hereof, your petitioner is submitting for filing an application for further time to file statement of executory contracts, schedules and statement of affairs.

WHEREFORE, your petitioner prays that proceedings may be had upon this petition in accordance with the provisions of Chapter XI of the Bankruptcy Act.

GOLDEN ENTERPRISES, INC.

By: (s) Thomas S. Dlugos

Vice President, Debtor

(s) James M. Gaither, Jr., Attorney

for Petitioner

Butner and Gaither

Post Office Box 2323

Hickory, North Carolina 28601

(Verification omitted in printing)

(Jurat omitted in printing)

EXHIBIT A

PROPERTY LEASED BY GOLDEN ENTERPRISES, INC.

Address	Landlord	Expiration Date of Lease
819 South Lafayette Shelby North Carolina 28150	Willie George Costner	May 1, 1974
7035 Laurel Canyon Blvd North Hollywood California 90046	Continental Laurel	August 31, 1973
9100 Wilshire Boulevard Suites 113 and 114 Beverly Hills California 90212	Buckeye Realty and Management Corporation	December 21, 1977
14724 Ventura Boulevard Suite 103 Certified Life Building Sherman Oaks California 91403	Buffeteria, Ltd.	August 31, 1975
1047 Broad Street Gainesville Georgia 30501	William Grooh	February 1, 1974
115 Fourth Street, N. W. Hickory North Carolina 28601	Colonial Stores	July 31, 1973

November 15, 1973

Aljas Realty Corporation

1234 South Center Street

Hickory

North Carolina 28601

EXHIBIT B

PROPERTY OWNED BY GOLDEN ENTERPRISES, INC.

1. Warehouse building leased to Metelpel Products, Inc., located on "F" Avenue, S. E., in Hickory, North Carolina. The building is located on a portion of the land owned by Golden Enterprises, Inc. and described in Book 927 at Page 208 in the office of the Register of Deeds of Catawba County.

2. Warehouse building leased to Continental System Supply, a division of Superior Continental Corporation, located on State Road No. 1653 in Hickory, North Carolina.

3. Warehouse building leased to National Velvet Plusch, Inc., located at 1120 Tate Boulevard in Hickory, North Carolina. The building is located on a portion of the land owned by Golden Enterprises, Inc. and described in Book 990 at Page 629 in the office of the Register of Deeds of Catawba County.

4. One shopping center located on Fourth Street Drive,

S. W., in Hickory, North Carolina.

5. One building lot located on Ninth Street, N. W. For a description of said lot, see Book 940 at Page 365 in the Catawba County Registry.

6. Two building lots located on Fifth Street Circle, N. W., in Hickory, North Carolina. For a description of said lots, see Book 988 at Page 595 and Book 990 at Page 39 in the Catawba County Registry.

(Certificate of Registration omitted in printing)

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

ARRANGEMENT

Golden Enterprises, Inc., the above-named debtor, proposes the following arrangement with its unsecured creditors:

ARTICLE I

PROVISIONS MODIFYING OR ALTERING THE

RIGHTS OF UNSECURED CREDITORS

A. The unsecured debts of the debtor are divided into the following classes:

1. All debts which have priority under Section 64a(2), (4), (5) of the Bankruptcy Act.

2. All other debts, including claims arising from the rejection of executory contracts.

B. The unsecured debts of the debtor are treated as follows:

1. All debts included in Class 1 are to be paid in cash in full no later than January 15, 1974, or are to be paid in accordance with such agreement as may be made between any holder of such a debt and the debtor.

2. All debts included in Class 2 shall be settled and satisfied by the payment to the holders thereof of one hundred (100%) per cent of the unsecured indebtedness of debtor by the issuance of non-negotiable certificates of indebtedness to the unsecured creditors, said non-negotiable certificates of indebtedness being payable as follows:

Two and one-half (2-1/2%) per cent being due and payable on or before January 15, 1974, and ninety-seven and one-half (97-1/2%) per cent being due and payable on or before ten (10) years from the date of issuance (upon confirmation of the plan) and bearing no interest for the first five (5) years and bearing interest after five (5) years at the rate of ten (10%) per cent per annum.

Said non-negotiable certificates of indebtedness are to be secured by a mortgage on debtor's real estate for the aggregate amount of the non-negotiable certificates of indebtedness; said non-negotiable certificates of indebtedness, payable to the order of each creditor in Class 2 entitled to participate under Section 367 (3) of said Act, will be deposited for distribution, with such person or persons as the court may designate, within ten (10) days after confirmation of the arrangement; said non-negotiable certificates of indebtedness, payable to the order of each creditor in Class 2 entitled to participate under Section 370 of said Act, will be so deposited within ten (10) days after the allowance of any such debt; and the rights of creditors in Class 2 shall be modified and altered accordingly.

ARTICLE II

PROVISIONS FOR THE COMPLETION OF

DEBTOR'S REAL ESTATE

Subject to confirmation, debtor has obtained financing

needed to complete a major real estate project, thereby creating equity for the mortgage of the unsecured creditors. (See "Note A" for further explanation.) Therefore, upon confirmation debtor shall cause a mortgage in favor of First-Citizens Bank and Trust Company, Hickory, North Carolina, to be placed on the real estate of debtor prior to the mortgage of unsecured creditors. This note and deed of trust shall be for not more than the sum of Four Hundred Sixty Thousand ($460,000.00) Dollars and amortizable over a period of fifteen (15) years upon such terms and conditions to be agreed upon between First-Citizens Bank and Trust Company and the Creditors' Committee of Golden Enterprises, Inc. Such agreement shall contain provisions regulating the rights of the bank with respect to excess cash flow of debtor's Real Estate Division as a means of amortizing the loan. (See attached "Note B" for information regarding projected equity buildup in debtor's real estate.) The mortgage of First-Citizens Bank and

Trust Company shall be superior to the mortgage for the unsecured creditors.

ARTICLE III

PROVISIONS REGARDING OPERATION OF

DEBTOR'S RETAIL OPERATIONS

Until all of the non-negotiable certificates of indebtedness provided for in Article I hereof have been paid in full, the statutory committee of creditors shall have the following supervision and control of the debtor's business:

1. The debtor shall employ an accountant designated by said committee, who shall countersign all checks issued by the debtor, and who shall prepare quarterly operating statements, three (3) copies of which shall be furnished to said committee.

2. The debtor shall not contract any obligation over One Thousand ($1,000.00) Dollars without the prior approval in writing of the chairman of said committee.

3. The debtor shall not fix the salary of any of its

employees without the prior approval in writing of the chairman of said committee.

4. Debtor shall continue to operate at the retail level under existing orders and agreements with secured creditors so as to repay all secured creditors, including the taxing authorities, who have or might claim liens on debtor's inventory no later than January 15, 1974.

5. Debtor shall join in the execution of all documents relating to agreements between the Creditors' Committee and Commercial Credit Business Loans, Inc. regarding the operation of debtor's business until the lien and debt of Commercial Credit Business Loans, Inc. is satisfied.

6. During the term of this arrangement, debtor agrees to operate its Retail Division only so long as it has the express recommendation of the Creditors' Committee to so operate. In the event the Creditors' Committee recommends termination of the debtor's retail

operations following confirmation, debtor agrees to terminate all retail operations within thirty (30) days of receipt of written notice to do so. In the further event that debtor's retail operations are curtailed or are suspended pursuant to recommendations of the Creditors' Committee, debtor agrees to further abide by the regulations of the Creditors' Committee with respect to debtor's operation of its Real Estate Division.

ARTICLE IV

PROVISIONS FOR PAYMENT OF DEBTS INCURRED DURING PENDENCY OF ARRANGEMENT

All debts incurred after the filing of the petition and prior to the confirmation of the arrangement shall be paid in cash in full upon confirmation, except that the time of payment of all or any part of such debts may be extended by agreement with the creditors to whom such debts are due, and such extended debts shall, when due, have priority in payment over the debts affected by this arrangement.

ARTICLE V

PROVISIONS FOR RETENTION OF JURISDICTION

BY THE COURT

The court shall retain jurisdiction until the deposit and distribution of the notes provided for in Article I hereof and the completion of the placement of the second and third mortgage hereinabove referred to on the public records.

ARTICLE V

GENERAL PROVISIONS

The costs and expenses of the proceedings, including allowable expenses of the committee of creditors and administration expenses, are to be paid in cash in full upon confirmation, or are to be paid in accordance with such agreement as may be made between the debtor and any person entitled to be paid such costs and expenses.

Debtor agrees to accept recommendations of the Creditors' Committee for accelerated payments on the

aforesaid non-negotiable certificates of indebtedness in the event the Creditors' Committee determines that the business is in a position to make such payments from time to time during the term of the plan.

GOLDEN ENTERPRISES, INC.

By: (s) Thomas D. Golden

President of said Corporation

Debtor

NOTE A

REAL ESTATE PLAN

Golden Enterprises, Inc. owns real estate with an MAI appraised value in its completed condition of $2.2 million. First mortgages against the property total approximately $1.2 million. At the present time, there is a second mortgage on all property due February, 1974, in the amount of $250,000.00. First-Citizens Bank and Trust Company has a third mortgage in the original amount of $200,000.00.

One of the essential parts of the plan of reorganization is the completion of real estate owned by Golden Enterprises, Inc. and the placement of a third mortgage in favor of all creditors against all real estate in its completed condition. This will be accomplished by the following steps: Golden Enterprises, Inc. owns property which is located on Tate Boulevard in Hickory, North Carolina. There is presently a completed building containing approximately 90,000 square feet and

a building containing approximately 45,000 square feet which is 60% completed. Shelby Savings and Loan Association, a lending institution, has committed $755,000.00 for this project. The sum of $300,000.00 has been used to pay off the 90,000 square foot building. Shelby Savings and Loan Association is holding $455,000.00 which has been committed as follows:

(1) $70,000.00 to pay off a purchase money note and deed of trust on a portion of the property which is due January, 1974.

(2) $250,000.00 to pay off a construction loan at First-Citizens Bank and Trust Company when the second building is completed.

(3) $135,000.00 remaining is to be applied toward the bills of the contractor and the subcontractors.

Because of the increased building costs, as well as work done by the contractors and subcontractors at the Golden Enterprises, Inc.'s shopping center on Fourth Street, S. W., this $135,000.00 is insufficient to pay the

general contractor and all of the subcontractors. The total amount needed to complete the real estate is $245,000.00, leaving the company $110,000.00 short.

Arrangements have been made at First-Citizens Bank and Trust Company, Hickory, North Carolina, to borrow the $110,000.00. This is to be accomplished as follows: First-Citizens Bank and Trust Company will assume the present $250,000.00 second mortgage. It will give to the company a sum not to exceed $110,000.00 to complete the real estate. It will cancel its third mortgage and place the $100,000.00 owed to First-Citizens Bank and Trust Company in with the mortgage so as to have one second mortgage in the original amount of $460,000.00 placed against all of the real estate of Golden Enterprises, Inc.

The excess cash flow generated by rents on Golden Enterprises, Inc.'s real estate will be used to repay approximately $300,000.00 of the $460,000.00 mortgage. Since the excess cash flow (approximately an amount

of $40,000.00 per year) is insufficient to amortize the current second mortgage, it will be necessary for Golden Enterprises, Inc. to repay the $110,000.00 out of sales to the bank, leaving the bank with a second mortgage of $350,000.00. Although this amount still cannot be amortized, First-Citizens Bank and Trust Company has indicated its willingness to be repaid along with general creditors when the first mortgages are in a position to be refinanced so as to pay everyone, including unsecured creditors.

NOTE "B"

GOLDEN ENTERPRISES, INC.

Cash Projection Commercial Real Estate

Ten Years

	First Year	Second Year	Third Year
CASH PROVIDED BY:			
Gross Rents			
Under present leases	$225,742.30	$225,742.30	$225,742.30
Renewed leases - increases	-	-	-
Total cash provided	$225,742.30	$225,742.30	$225,742.30
CASH APPLIED AGAINST DEBT PAYMENT			
First Mortgages			
First National Bank	$ 11,560.80	$ 11,560.80	$ 11,560.80
Shelby Savings & Loan Assoc.	31,645.08	31,645.08	31,645.08
Shelby Savings & Loan Assoc.	97,359.24	97,359.24	97,359.24
Fidelity Federal Savings & Loan Assoc.	30,402.24	30,402.24	30,402.24
Second Mortgages			
First-Citizens Bank & Trust Co.	44,000.00	44,000.00	44,000.00
Total cash applied against debt	$214,967.36	$214,967.36	$214,967.36
EXCESS CASH FLOW AVAILABLE FOR OPERATING EXPENSES AND INCOME TAXES	$ 10,774.94	$ 10,774.94	$ 10,774.94
ESTIMATED OPERATING EXPENSES AND INCOME TAXES:			
Insurance	$ 1,300.00	$ 1,800.00	$ 1,800.00
Repairs	3,800.00	4,000.00	4,050.00

Property Taxes	4,800.00	6,000.00	6,000.00
Income Taxes	-	-	-
Total estimated operating expenses and taxes	$ 9,900.00	$ 11,800.00	$ 11,800.00
EXCESS CASH FLOW	$ 874.94	$(1,025.06)	$(1,025.06)

84a

CASH PROVIDED BY:

	Fourth Year	Fifth Year	Sixth Year
Gross Rents			
Under present leases	$225,742.30	$225,742.30	$225,742.30
Renewed leases - increases	2,834.00	4,644.50	4,644.50
Total cash provided	$228,576.30	$230,386.80	$230,386.80
CASH APPLIED AGAINST DEBT PAYMENT			
First Mortgages			
First National Bank	$ 11,560.80	$ 11,560.80	$ 10,597.40
Shelby Savings & Loan Assoc.	31,645.08	31,645.08	31,645.08
Shelby Savings & Loan Assoc.	97,359.24	97,359.24	97,359.24
Fidelity Federal Savings & Loan Assoc.	30,402.24	30,402.24	30,402.24
Second Mortgages			

85a

First-Citizens Bank & Trust Co.	44,000.00	44,000.00	44,000.00
Total cash applied against debt	$214,967.36	$214,967.36	$214,003.96
EXCESS CASH FLOW AVAILABLE FOR OPERATING EXPENSES AND INCOME TAXES	$ 13,608.94	$ 15,419.44	$ 16,382.84
ESTIMATED OPERATING EXPENSES AND INCOME TAXES:			
Insurance	$ 2,000.00	$ 2,200.00	$ 2,200.00
Repairs	4,200.00	4,400.00	4,400.00
Property Taxes	6,300.00	6,600.00	6,600.00
Income Taxes	-	-	-
Total estimated operating expenses and taxes	$ 12,500.00	$ 13,200.00	$ 13,200.00

EXCESS CASH FLOW	$ 1,108.94	$ 2,219.44	$ 3,182.84

	Seventh Year	Eighth Year	Ninth Year
CASH PROVIDED BY:			
Gross Rents			
Under present leases	$225,742.30	$225,742.30	$225,742.30
Renewed leases - increases	4,644.50	4,644.50	4,644.50
Total cash provided	$ 230,386.80	$230,386.80	$230,386.80
CASH APPLIED AGAINST DEBT PAYMENT			
First Mortgages			
First National Bank	$ -	$ -	$ -
Shelby Savings & Loan Assoc.	31,645.08	31,645.08	31,645.08
Shelby Savings & Loan Assoc.	97,359.24	97,359.24	97,359.24
Fidelity Federal Savings & Loan Assoc.	30,402.24	30,402.24	30,402.24
Second Mortgages			
First-Citizens Bank & Trust Co.	44,000.00	44,000.00	44,000.00
Total cash applied against debt	$203,406.56	$203,406.56	$203,406.56
EXCESS CASH FLOW AVAILABLE FOR OPERATING EXPENSES AND INCOME TAXES	$ 26,980.24	$ 26,980.24	$ 26,980.24
ESTIMATED OPERATING EXPENSES AND INCOME TAXES:			
Insurance	$ 2,400.00	$ 2,400.00	$ 2,600.00
Repairs	4,600.00	4,600.00	4,800.00
Property Taxes	6,800.00	6,800.00	7,000.00
Income Taxes	*	*	*
Total estimated operating expenses and taxes	$13,800.00	$ 13,800.00	$ 14,400.00

EXCESS CASH FLOW	$ 13,180.24	$ 13,180.24	$ 12,580.24

CASH PROVIDED BY:

	Tenth Year
Gross Rents	
Under present leases	$225,742.30
Renewed leases - increases	4,644.50
Total cash provided	$230,386.80
CASH APPLIED AGAINST DEBT PAYMENT	
First Mortgages	
First National Bank	-
Shelby Savings & Loan Assoc.	$ 31,645.08
Shelby Savings & Loan Assoc.	97,359.24
Fidelity Federal Savings & Loan Assoc.	30,402.24
Second Mortgages	

First-Citizens Bank & Trust Co.	
Total cash applied against debt	44,000.00
EXCESS CASH FLOW AVAILABLE FOR OPERATING EXPENSES AND INCOME TAXES	$203,406.56
	$ 26,980.24
ESTIMATED OPERATING EXPENSES AND INCOME TAXES:	
Insurance	
Repairs	$ 2,600.00
Property Taxes	4,800.00
Income Taxes	7,000.00
Total estimated operating expenses and taxes	* $ 14,400.00

EXCESS CASH FLOW	$ 12,580.24

* Existing operating loss carry-overs will expire during the seventh year, and estimated income tax liabilities beyond the seventh year are unknown.

GOLDEN ENTERPRISES, INC.

Schedule of Equity In Rental Property By Years

	Fair Market Value	Mortgage Balance	Equity
First year	$ 2,271,000.00	$ 1,710,250.00	$ 560,750.00
Second year	2,385,000.00	1,652,182.00	732,818.00
Third Year	2,504,250.00	1,589,518.00	914,732.00
Fourth Year	2,629,463.00	1,520,888.00	1,108,575.00
Fifth Year	2,760,936.00	1,445,541.00	1,315,395.00
Sixth Year	2,898,982.00	1,362,891.00	1,536,091.00
Seventh Year	3,043,932.00	1,272,222.00	1,771,710.00
Eighth Year	3,196,128.00	1,173,722.00	2,022,406.00
Ninth Year	3,355,935.00	1,076,656.00	2,279,279.00
Tenth Year	3,523,732.00	924,759.00	2,598,973.00

PROOF OF CLAIM FOR INTERNAL REVENUE TAXES

BANKRUPTCY ACT PROCEEDINGS

IN THE DISTRICT COURT

FOR THE WESTERN DISTRICT OF N. C.

(Caption omitted in printing)

CLAIM OF THE UNITED STATES

FOR INTERNAL REVENUE TAXES

TAXPAYER's IDENTIFYING NUMBER:

Social Security No. _____

Employer Identification No. 56-0929458

The undersigned officer of the Internal Revenue Service, a duly authorized agent of the United States in this behalf, declares that:

1. The debtor is justly and truly indebted to the United States in the sum of $48,836.86.

2. The said debt is for taxes due under the internal revenue laws of the United States as follows:

A. LIEN CLAIMS (Notice of Federal Tax Lien filed prior to Bankruptcy Petition date)

KIND OF TAX	PERIOD	AMOUNT DUE	REMARKS	DATE NOTICE OF TAX LIEN FILED

B. PRIORITY CLAIMS

KIND OF TAX	PERIOD	AMOUNT DUE	REMARKS	DATE TAX ASSESSED
WT-FICA	3/31/73	$ 39,390.90		
Interest to 5/4/73		26.26		5/21/73
WT-FICA	4/1/73 thru 5/4/73	1,332.48		6/25/73
FUTA	12/31/72	2,601.10		
Interest to 5/4/73		40.32		6/4/73
FUTA	1/1/73 thru 5/4/73	5,445.80		6/25/73

Total amount of this claim $48,836.86

C. UNSECURED CLAIMS

KIND OF TAX	PERIOD	AMOUNT DUE	REMARKS	DATE TAX ASSESSED

3. No part of said debt has been paid and it is now due and payable at the Office of the District Director of Internal Revenue;

4. There are no set-offs or counterclaims to said debt;

5. Except for the tax liens protected by notices of lien filed on the date above, the United States does not hold, to my knowledge or belief, any security or securities for said debt;

6. No note or other negotiable instrument has been received for said debt or any part thereof, nor has any judgment been rendered with respect to said debt; and

7. Said debt is to be paid to the extent provided by law. See sections 17, 64, 77e, 199, 337(2), 455, and 659 of the Bankruptcy Act (11 U.S.C. 35, 104, 205(c), 599, 737(2), 855 and 1059).

/a/ Albert Bunton

July 12, 1973

Chief, Special Procedures Staff

Address

Special Procedures Staff

Internal Revenue Service

P. O. Box 20541

Greensboro, North Carolina 27420

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

IN THE MATTER OF:) IN PROCEEDINGS FOR

GOLDEN ENTERPRISES,INC.) AN ARRANGEMENT NO.

DEBTOR) ST-B-73-6

PETITION FOR ALLOWANCES BY

CO-COUNSEL TO CREDITORS' COMMITTEE

TO THE HONORABLE JOSEPH R. CRUCIANI,

REFEREE IN BANKRUPTCY:

The Petition of JOSEPH H. FRIER, JR., ARTHUR I. WINARD and J. CARROLL ABERNETHY, JR. who are acting as Co-Counsel to the Creditors' Committee herein, respectfully show and allege:

1. That each of your petitioners in his own right enjoy a national reputation as experts in the field of insolvency, and both Arthur I. Winard and Joseph H. Frier, Jr., have served as guest lecturers, appearing before various trade and bar groups with respect to

various phases of the insolvency law and are considered experts in the above field. Mr. Joseph H. Frier, Jr., is presently the Vice-President of the Bankruptcy Lawyers Bar Association.

2. That the petitioners were retained as counsel for a Creditors' Committee, which had been chosen at a meeting of the larger creditors at the offices of Arthur I. Winard, 475 Fifth Avenue, New York City, N. Y. This meeting was called at the request of many of the larger creditors, and by the principal officer of the debtor for the purpose of informing the creditors of the financial situation of the debtor and the various problems that were arising on an almost daily basis.

3. That the services for which compensation is requested represent legal services performed for and on behalf of the Creditors' Committee herein and not on behalf of the debtor or any other person.

4. That this case commenced by the filing of a petition for Arrangement pursuant to Section 322 of the Bankruptcy Act.

Debtor was engaged in the business of operating jewelry stores and for several years it had been purchasing merchandise from the suppliers who are now involved in this matter as creditors of the debtor.

5. At the time of the filing of the petition, the debtor also submitted an Application for leave to continue to operate the business as Debtor-in-Possession and was granted authority to do so by order of this Court.

6. At the request of the debtor and the insistence of many of the major creditors, an informal meeting of creditors was called by Messrs. Goldman, Frier & Altesman the firm of attorneys which represents The Jewelers Board of Trade, a nationwide organization which had many of its members involved in this Chapter XI proceeding, and Arthur I. Winard who represented other major creditors of the debtor.

At this meeting, a great majority of creditors representing claims owed, attended and listened to the report of Mr. Thomas Golden, the principal officer of

the debtor. The creditors present analyzed the figures that were submitted by the debtor and concluded that a complete financial analysis should be made by a creditors' committee that would be designated by creditors in order that all creditors could later obtain an accurate analysis of the debtor's financial situation.

The creditors at this meeting, organized a Creditors' Committee which Committee later retained Messrs. Goldman, Frier & Altesman and Arthur I. Winard as attorneys for the Creditors' Committee. Mr. Joseph H. Frier, Jr. then informed the creditors that it would be advisable to have local counsel serve wth him and obtained the authority of the Creditors' Committee and other creditors in attendance to retain J. Carroll Abernethy, Jr. as Special Counsel. Mr. George Solow of J. Solow & Sons, one of the major creditors was designated as the Chairman of such Creditors' Committee.

7. The Creditors' Committee's sole purpose in representing creditors was to realize the most for creditors

and yet attempt to continue the Debtor-in-Possession in business, giving it an opportunity to fulfill a Plan of Arrangement that could later be proposed to creditors.

8. Upon motion made at this creditors' meeting and seconded, the Committee passed a resolution to solicit claims for the purpose of voting for a tentative Trustee to act in the event of an adjudication in bankruptcy and to elect the unofficial Creditors' Committee that was appointed as the official Creditors' Committee at the first meeting before this Court.

9. Mr. Joseph H. Frier, Jr. and Arthur I. Winard, acting as counsel for the Creditors' Committee, advised the Committee of the services that had to be rendered under a Chapter XI proceeding, the duties and rights of the members of the aforesaid Committee and also emphasized to the aforesaid Committee that their duty was to represent not only their own firm but they had to, at all times throughout the proceedings, represent the interest of all unsecured creditors.

10. Your petitioners informed the Committee of the status of the proceeding and answered questions from the Committee members as to what could be expected in the Arrangement proceedings, the prognosis of the debtor's future, and how the Creditors' Committee could keep its proverbial finger on the debtor's pulse.

11. The petition authorizing the debtor to continue to operate was discussed and it was agreed by the Committee that the debtor should be continued without the necessity of putting up a bond of indemnification, at least until the accountant's report was made available and a Plan of Arrangement could be presented by the debtor.

12. Your petitioners, pursuant to instructions from the Committee, assisted in the preparation of a detailed, factual letter setting forth the history of the case to that point, reciting the financial figures referred to, and prepared a form of Proof of Debt and Power of Attorney running to the members of the Committee and its counsel.

It had been explained that the Proof of Debt would be used only for the purpose of voting for a tentative Trustee as aforesaid and for the Official Creditors' Committee.

13. The firms of Goldman, Frier & Altesman and J. Carroll Abernethy, Jr. attended the first meeting of creditors held before this Court and thereupon proceeded to elect the Creditors' Committtee as an Official Committee and filed various proofs of claim that were forwarded to the Creditors' Committee by other creditors throughout the United States.

After the scheduled hearing, a meeting was held with the debtor's attorney for the purpose of discussing the entire asset structure of the debtor, including vast holdings of real estate and laying the groundwork for a Plan of Arrangement that was ultimately worked out between all the attorneys involved herein.

14. Being that there was such a short time between the meeting of the Creditors' Committee and the date set

for the first meeting of creditors before the Bankruptcy Court, it was necessary for the firm of Goldman, Frier & Altesman to personally contact the larger creditors throughout the New York area to obtain the claims from them that they wanted to file in this proceeding for the purpose of supporting the Creditors' Committee in its efforts to obtain a better Plan from the debtor. This consumed many hours of time, which often involved legal explanations to the creditors signing the Proofs of Claim as to what their rights were and what the proceeding was all about. As a result of the efforts made, the claims were made available in time for the first meeting, at which time the Creditors' Committee was appointed.

15. After the first meeting, an Order was prepared by your petitioners and submitted to this Court, designating the Official Creditors' Committee.

16. When being notified that an accountant's report had been completed, your petitioners called another

meeting of the Creditors' Committee in New York City, at which time the final report was reviewed in detail of the operations of the debtor prior to the filing of its Petition for Arrangement, were carefully examined including the personal drawings of the principal officer. It took several hours for the Committee to digest the report and a great deal of discussions were held in relation thereto, and many thoughts were exchanged by the members of the Creditors' Committee and your petitioners in relation to the aforesaid report.

17. After a careful analysis of the situation the Committee decided that it would be in the best interests of all creditors to have the debtor present an outline of a proposed Plan of Arrangement whereby creditors would receive payment in full over an extended period of time. As attorneys for the Creditors' Committee, your petitioners analyzed for such Committee the breakdown of the value of the assets if sold at public auction sale and also gave the Committee an

analysis of all other assets that could be counted on in the event that a bankruptcy took place.

Your petitioners were instructed by the members of the Committee to meet again with the debtor and its representatives for the purpose of working out a Plan of payment that would be acceptable to all concerned.

Mr. Joseph H. Frier, Jr. of Goldman, Frier & Altesman, had several conferences with the attorneys for the debtor in connection with a proposed Plan of arrangement, and the vast experience of Mr. Frier in bankruptcy proceedings were utilized in arriving at a Plan which could be presented to the Creditors' Committee for their consideration. The Plan provided for payment of 2-1/2% by January 15th, 1974 and the remaining 97-1/2% over a ten (10) year period with various items of protection for the creditors, such as mortgages on real property, guarantees, etc. The unanimous feeling was that the only way in which creditors could actually be paid 100¢ on the dollar, would be through

the real property owned by the debtor. If this property could be improved upon and be fully utilized, its projected income over a period of several years could produce sufficient monies to pay creditors in full. A draft of a Plan was thereafter prepared and submitted to the Creditors' Committee for their consideration.

18. While all these negotiations were being conducted by Messrs. Goldman, Frier & Altesman, Arthur I. Winard and the attorneys for the debtor, the Special Counsel J. Carroll Abernethy, Jr., for Goldman, Frier & Altesman and Arthur I. Winard, attended all Court hearings in connection with this Chapter XI proceeding.

19. During the course of this proceeding, it became known that the First Citizens Bank & Trust Co. which had an alleged lien on the assets of the debtor, was claiming title to certain assets of the debtor which were removed from debtor's California operation to its North Carolina operation. Your petitioners conducted an investigation of this purported lien and

thereafter advised the Creditors' Committee that such alleged secured creditor did not actually have a valid secured interest in and to the aforesaid property, and at the instructions of the Creditors' Committee prepared a legal brief for the purpose of either having the debtor object to such security or object to such security on behalf of the Creditors' Committee.

In the conference that followed, it developed that it was absolutely necessary for the debtor to have the co-operation of the First Citizens Bank as additional advancement of monies were necessary in order for the debtor to continue the operating of its business. It was therefore, decided not to object to the security interest in consideration for the advancement of further sums to the debtor. In that way, the general creditors, the secured party and the debtor were mutually benefited.

20. That your petitioners, at the request of the debtor and the Creditors' Committee, arranged for a

further meeting for the purpose of discussing debtor's proposed Plan of Arrangement. At this meeting, the contents of the Plan were thoroughly discussed and your petitioners had to explain all the legal ramifications contained therein to the Creditors' Committee. The final determination made was that the Plan as presented did not thoroughly protect the creditors and your petitioners were instructed to prepare a revised Plan of Arrangement in conjunction with the attorneys for the debtor that would be more suitable for the ultimate protection to creditors.

Unfortunately, there was a time problem involved as the party who was going to invest large sums of money into the debtor's real estate operation insisted that everything be crystallized by a certain date, and that the debtor's Plan be accepted by such time by the requisite number of creditors. It was decided to permit the debtor to file the original Plan and that later an amended Plan could be filed. Since this amended

Plan was to be a better one, your petitioners concluded that it was not necessary to send out a second plan to the creditors at such later date.

21. Your petitioners, at the instructions of the Creditors' Committee communicated with all creditors through a letter which was written to such creditors explaining the details of the Plan and containing the recommendation of the Creditors' Committee with creditors signing a Consent to such Plan of Arrangement. The Consent was also prepared by your petitioners, and this Consent contained a clause that should any better Plan be filed thereafter, the same Consent would apply to the amended Plan.

As a result of this letter and the many telephone conversations that each of your petitioners had with various creditors sufficient Consents were eventually received that enabled debtor's Plan of Arrangement to be accepted by the requisite majority of creditors in amount and number.

22. During the course of this proceeding, your petitioners as attorneys for the Creditors' Committee, were informed that the Commercial Credit Business Loans, Inc., a secured creditor of the above named debtor, was threatening to close down completely the retail operation of the debtor temporarily to prevent incurring all further operating losses and curtail operations and expenses of the debtor and that an Order to Show Cause was going to be submitted to the Court by the aforesaid applicant. One of your petitioners appeared in Court on the aforesaid hearing and at such time, an Agreement was made by all the parties in interest to permit the debtor to continue the operations.

23. The debtor's lease on the building located at 115-4th Street, North West, Hickory, N. C. expired on the 31st day of July, 1973. The debtor's representatives informed your Committee that there was a possibility of negotiating a new lease with a J. P. Whitener, the owner of a building located at 64-70

Southwest, Hickory, N. C. It was necessary for your petitioners as attorneys for the Creditors' Committee to go into the details of the contemplated lease to determine whether it would be in the best interest of creditors to permit the debtor to move to the aforesaid premises. After analyzing all the costs involved and the further conferring with Commercial Business Loans, Inc., which was a major secured creditor of the above named debtor, your petitioners finally gave approval to the aforesaid move and the entry by the debtor into a new lease arrangement.

24. Your petitioners were advised by the aforesaid debtor that the debtor could enter into a contract with Smith Enterprises, Inc. wherein this company would contact former customers of the debtor under its premium catalogue sales program; and for this right, would pay to the debtor 5% of the gross sales of premium catalogue sales to any former customers of the debtor. A copy of the contract was exhibited to your

petitioners and after consultation with the Creditors' Committee, and making a thorough analysis as to what this contract could mean in the way of financial remuneration to the debtor, your petitioners gave their consent to the entry of such contract.

25. Your petitioners still have to arrange for the actual execution and delivery of the various items of protection for the creditors as provided for in the Amended Plan of Arrangement, and as a result, a great deal of legal work still remains to be done. The Plan herein has yet to be confirmed, and a hearing will be held as to the feasibility and best interests. Your petitioners will have to attend the aforesaid hearing. When distribution under the Plan is to be made, your petitioners will unquestionably be called upon to ascertain whether proper distribution has been made. Your petitioners will have to supervise the preparation of a Master promissory note securing the balance of 97-1/2% as provided for under the Plan.

26. Since this Amended Plan will take approximately ten years to achieve, it is obvious that many legal problems will arise during the ensuing years, possibilities being the acceleration of payments so that creditors can be paid over a shorter period of time, analysis of periodic financial reports to be submitted by the debtor, the involvement of the debtor in possible law suits in the future, etc. It is therefore, apparent that many hours of future legal services will be performed by your petitioners in connection with this matter.

27. Your petitioners have attempted to outline the services rendered by their respective firms and to actually list every hour and minute would serve no particular purpose except to unduly lengthen this Application. The telephone conversations with co-counsel, the debtor, the attorney for the debtor and with members of the Creditors' Committee and other interested parties were highly numerable. The correspondence was most voluminous and the files of all

attorneys in this matter are very thick with legal content. In the preparation of the final Plan and throughout all the negotiations in connection therewith, attempts were made to accommodate the wishes of all the creditors. The filing of the improved Plan and the chances of creditors getting a better deal are all the result of the constant attention and perseverance given by your petitioners to this matter. This case called for a particularly high degree of initiative, imagination and skill. Throughout the proceedings, Arthur I. Winard and Joseph H. Frier, Jr. who are senior partners in their firms, took personal charge and were consulted on all major questions of policy and procedure. Mr. J. Carroll Abernethy, Jr. likewise, personally devoted his services to this proceeding. Both Mr. Frier and Mr. Winard have varied and extensive knowledge and experience in insolvency proceedings. Both are regarded as authorities in this field, and Mr. J. Carroll Abernethy, Jr. in his

own right, is quite an authority on commercial and insolvency laws.

28. In evaluating their services, petitioners rely upon their background, experience, the complexities of this matter, the amount of time consumed in the administration of these proceedings and the success in effectuating a Plan in the best interests of creditors and the amount involved in the distribution to creditors. Ultimately there will have been paid out a sum approaching $1,300,000.00 and the matter was handled by your petitioners with a keen sense of the responsibility involved in so substantial a sum.

The functions of a Creditors' Committee includes passing judgment upon the proposed Plan of Arrangement, "it weighs the possibilities of rehabilitation and the terms of the Debtor's offer". While your petitioners have glossed over the negotiations between the debtor and the Committee pertaining to the ultimate proposal, they do not intend to indicate that it was a simple matter. On the contrary, it was most difficult and your

petitioners' assistance resulted in an improvement of the Plan.

Little need be said concerning the examination into the debtor's prior payments and transfers for possible preferences, fraudulent and voidable, and all the other and pertinent matters that necessarily fell to their lot.

29. Taking into consideration the factors involved in fixing a fee which include "the amount involved, the problems which arose, their complexities and solution, the result achieved, the opposition encountered, the experience and standing of a counsel and time consumed", your petitioners, taking all the circumstances into account, request an allowance therefor for services to date and to be rendered in the sum of $22,000.00.

30. That the successful conclusion of this proceeding will give the debtor an opportunity to continue his operation as well as enable creditors to realize a maximum benefit under the circumstances and to

continue a business relationship with, hopefully, a rehabilitated business.

31. That all the services for which compensation is being requested were performed for and on behalf of the creditors.

32. Your petitioners wish to point out to this Court that they are requesting only one fee in their capacity as attorneys for the Official Creditors' Committee so that it is obvious to this Court that there will not be compounded fees in connection with this proceeding. The division of such fees are set forth in the affidavits annexed hereto and made a part hereof and is based upon the services actually performed by each of the aforesaid attorneys.

DATED: Nov. 12, 1973

GOLDMAN, FRIER & ALTESMAN,

By: Joseph H. Frier, Jr. - Partner

ARTHUR I. WINARD

By: Arthur I. Winard

J. CARROLL ABERNETHY

By: J. Carroll Abernethy

RE: GOLDEN ENTERPRISES, INC.

DISBURSEMENTS OF

GOLDMAN, FRIER & ALTESMAN

Plane tickets to Charlotte, North Carolina	$ 99.27
Long Distance Telephone Calls to Charlotte, N. C.	134.34
Zeroxing various documents submitted to Creditors' Committee and several creditors	85.00
TOTAL DISBURSEMENTS	$318.61

YOUR PETITIONERS REQUEST REIMBURSEMENT OF THE AFORESAID OUT OF POCKET EXPENSES.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

(Caption omitted in printing)

STATE OF NEW YORK)

COUNTY OF NEW YORK) SS.:

JOSEPH H. FRIER, JR. being duly sworn, deposes and says:

I am a member of the firm of GOLDMAN, FRIER & ALTESMAN. Said firm is co-counsel with the firms of ARTHUR I. WINARD, ESQ. and J. CARROLL ABERNETHY, JR. for the Creditors' Committee in the within proceeding. I have read the foregoing petition and know the contents thereof; the same is true to the best of my knowledge, except as to those matters therein alleged to be upon information and belief, and as to those matters, I believe them to be true.

(Jurat omitted in printing)

/s/ Joseph H. Frier, Jr.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

(Caption omitted in printing)

STATE OF NEW YORK)

COUNTY OF NEW YORK) SS.:

ARTHUR I. WINARD, being duly sworn, deposes and says:

I am Co-Counsel with the firms of GOLDMAN, FRIER & ALTESMAN and J. CARROLL ABERNETHY, JR. for the Creditors' Committee in the within proceeding. I have read the foregoing petition and know the contents thereof; the same is true to the best of my knowledge, except as to the matters therein alleged to be upon information and belief, and as to those matters, I believe them to be true.

(Jurat omitted in printing)

/s/ Arthur I. Winard

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

(Caption omitted in printing)

STATE OF NORTH CAROLINA)

COUNTY OF CATAWBA) SS.:

J. CARROLL ABERNETHY, JR., being duly sworn deposes and says:

I am Co-Counsel with the firms of GOLDMAN, FRIER & ALTESMAN and ARTHUR I. WINARD for the Creditors' Committee in the within proceeding. I have read the foregoing petition and know the contents thereof; the same is true to the best of my knowledge, except as to the matters therein alleged to be upon information and belief, and as to those matters, I believe them to be true.

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

(Caption omitted in printing)

STATE OF NEW YORK)

COUNTY OF NEW YORK) SS.:

ARTHUR I. WINARD, being duly sworn, deposes and says:

I am Co-Counsel with GOLDMAN, FRIER & ALTESMAN and J. CARROLL ABERNETHY JR. for the Creditors' Committee in the above entitled matter.

In accordance with Section 62 D of the Bankruptcy Act, as amended, your deponent hereby states that no agreement or understanding exists between me and GOLDMAN, FRIER & ALTESMAN and J. CARROLL ABERNETHY JR. and other persons for the division of compensation and that no division of compensation will be made by said attorneys except that of whatever fees are allowed, the firms of GOLDMAN, FRIER & ALTESMAN and myself are to receive forty (40%) per

cent each and J. CARROLL ABERNETHY JR. will receive twenty (20%) per cent for acting as Special Counsel to the attorneys for the Creditors' Committee.

No Agreement prohibited by Title 18 USC Section 155 has been made.

Neither I, GOLDMAN, FRIER & ALTESMAN nor J. CARROLL ABERNETHY JR. have entered into any Agreement, expressed or implied, with any other party in interest including the Debtor herein, any creditor, the Debtor-in-Possession or any representative of any of them or with any attorney or any such party in interest in the proceeding for the purpose of fixing the fees or other compensation to be paid to any such party in interest or any attorney for any such party in interest for services rendered or expenses incurred in connection therewith from the assets of the estate, in excess of the compensation allowed by this Court.

(Jurat omitted in printing)

/s/ Arthur I. Winard

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

(Caption omitted in printing)

STATE OF NEW YORK)

COUNTY OF NEW YORK) SS.:

JOSEPH H. FRIER, JR., a partner in the firm of GOLDMAN, FRIER & ALTESMAN, being duly sworn, deposes and says:

Our firm is Co-Counsel with ARTHUR I. WINARD and J. CARROLL ABERNETHY JR. for the Creditors' Committee in the above entitled matter.

In accordance with Section 62 D of the Bankruptcy Act, as amended, your deponent hereby states that no agreement or understanding exists between our firm and ARTHUR I. WINARD and J. CARROLL ABERNETHY JR. and other persons for the division of compensation and that no division of compensation will be made by said attorneys except that of whatever feesare allowed the firms of GOLDMAN, FRIER & ALTESMAN and ARTHUR I. WINARD are to receive forty (40%) percent

each and J. CARROLL ABERNETHY JR. will receive twenty (20%) percent for acting as Special Counsel to the attorneys for the Creditors' Committee.

No Agreement prohibited by Title 18 USC Section 155, has been made.

Neither GOLDMAN, FRIER, & ALTESMAN, ARTHUR I. WINARD nor J. CARROLL ABERNETHY JR. have entered into any Agreement, expressed or implied, with any other party in interest including the debtor herein, any creditor, the Debtor-in-Possession or any representative of any of them, or with any attorney or any such party in interest in the proceeding for the purpose of fixing the fees or other compensation to be paid to any such party in interest or any attorney for any such party in interest for services rendered or expenses incurred in connection therewith from the assets of the estate, in excess of the compensation allowed by this Court.

(Jurat omitted in printing)

/s/ Joseph H. Frier, Jr.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

(Caption omitted in printing)

STATE OF NORTH CAROLINA)

COUNTY OF CATAWBA) SS.:

J. CARROLL ABERNETHY JR., being duly sworn, deposes and says:

I am Co-Counsel with GOLDMAN, FRIER & ALTESMAN and ARTHUR I. WINARD for the Creditors' Committee in the above entitled matter.

In accordance with Section 62 D of the Bankruptcy Act, as amended, your deponent hereby states that no agreement or understanding exists between me and GOLDMAN, FRIER & ALTESMAN and ARTHUR I. WINARD, and other persons for the division of compensation and that no division of compensation will be made by said attorneys except that of whatever fees are allowed the firms of GOLDMAN, FRIER & ALTESMAN and ARTHUR I. WINARD are to receive forty (40%) per

cent each and I will receive twenty (20%) per cent for acting as Special Counsel to the attorneys for the Creditors' Committee.

No agreement prohibited by Title 18 USC Section 155 has been made.

Neither I, GOLDMAN, FRIER & ALTESMAN nor ARTHUR I. WINARD have entered into any Agreement, expressed or implied, with any other party in interest including the Debtor herein, any creditor, the Debtor-in-Possession or any representative of any of them or with any attorney or any such party in interest in the proceeding for the purpose of fixing the fees or other compensation to be paid to any such party in interest or any attorney for any such party in interest for services rendered or expenses incurred in connection therewith from the assets of the estate, in excess of the compensation allowed by this Court.

(Jurat omitted in printing)

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

Honorable Joseph R. Cruciani, Bankruptcy Judge:

We, hereby submit request for payment in the amount of $1,956.00 for services rendered in regard to Golden Enterprises, Inc. and its bankruptcy petition. Our services rendered pertain to the following:

Preparation of cash forecast on commercial rental properties:

13 hrs. at 20.00	$ 260.00
4-1/2 hrs. at 10.00	45.00
	$ 305.00

Assistance in bringing books up to date and preparation of unaudited balance sheets, statement of affairs and deficiency statements at May 4, 1973:

79-1/2 hrs. at 20.00	$1,590.00	
3 hrs. at 10.00	30.00	1 1,620.00

Xerox Copies	30.00
Telephone Calls	1.00
	$ 1,956.00

All services performed subsequent to the date which the bankruptcy was ratified by the court are not included in the above request.

Very truly yours,

/s/ Lawing, Rowe & Company

WJL/ab

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

APPLICATION

Now comes James M. Gaither, Jr., attorney for the debtor in the above-referred-to matter and shows unto the Court:

1. That he has represented Golden Enterprises, Inc. since it was incorporated in 1968.

2. That he was appointed to represent debtor in the proceedings for an arrangement No. ST-B-73-6.

3. That a Plan of Arrangement has been accepted by the requisite number of creditors of the debtor.

4. That the debtor has been ordered to file an application for confirmation by no later than December 30, 1973.

5. That he has done the following matters and things in his capacity as attorney for the debtor immediately prior to the filing of the Petition under

Chapter XI of the Bankruptcy Act and has continued to perform services to the date of this application:

Conferences with Golden Enterprises, Inc. including conferences with Judge Joseph R. Cruciani regarding the Petition under Chapter XI of the Bankruptcy Act - 7 hours

Preparation of Petition and accompanying schedules - 10 hours

Application to Employ Attorney, Application to Stay Enforcement of Liens, and respective Orders - 2 hours

Application for Further Time to File Statement of Executory Contracts, Schedules and Statement of Affairs - 2 hours

Preparation of executory contracts - 8 hours

Notice of first meeting - May 30, 1973 - 1 hour

Notice of adjourned first meeting - June 12, 1973 - 1 hour

Preparation for first meeting - 5 hours

Attending first meeting and adjourned first meeting - 12 hours

Meetings and conferences with Commercial Credit Business Loans, Inc. regarding the following:

Initial Petition - 2 hours

Thomasville transaction including Order - 10 hours

Shelby transaction - 10 hours

Operation of business relative to July 24, 1973, Order - 10 hours

California inventory - 7 hours

Petition to Reclaim of Matshushita dated June 18, 1973 - 3 hours

Conferences with Golden Enterprises, Inc. and Matshushita - 5 hours

Hearings regarding Matshushita claim - 5 hours

Conferences with Marine Midland Leasing Corporation - 12 hours

Conferences with Sidney Shiffman regarding Golden Enterprises, Inc.'s lease in California and settlement of the lease - 8 hours

William Grooh, Gainesville, Georgia, matter including conferences, Motions, Order and show cause hearing and resultant Orders - 25 hours

Conferences with Charles Camp and Crawley Cash regarding Shelby sale of Golden Enterprises, Inc.'s inventory including hearings on same - 15 hours

Temporary Order Regulating Operation of Debtor's Business and Petition to Sell Assets and to Ratify Prior Sale of Assets - drafting only - 3 hours

Application to Employ Accountant - drafting only - 1 hour

Order Staying Enforcement of Liens - drafting only - 1/2 hour

Conferences with Francis Fairley and Commercial Credit Business Loans, Inc. regarding operation of debtor's business - May to January 1974 - 20 hours

Preliminary Plan of Reorganization - drafting and conferences - 25 hours

Conferences with Smith Enterprises, Inc. regarding 5% sales agreement - June 1973 - 10 hours

Drafting contract between Golden Enterprises, Inc. and Smith Enterprises, Inc., hearing on contract, Order accepting terms of contract, and contract revisions - 8 hour

Conferences and correspondence with Federal and State taxing authorities - 5 hours

Final draft of Preliminary Plan of Reorganization of Golden Enterprises, Inc. - 5 hours

Notice of hearing - September 25, 1973 - 1 hour

Conferences with Commercial Credit Business Loans, Inc. regardig operation of business and Plan of Arrangement - 12 hours

Conferences with Robert L. McKaughn, Jr., William E. Butner, First-Citizens Bank and Trust Company, North Carolina National Bank, Shelby Savings and Loan Association, Bankruptcy Court, and Creditors' Committee regarding second mortgage to implement Plan of Arrangement - 137 hours

Conferences with National Velvet Plusch, Inc. regarding lease, lease amendments and adjustments - 15 hours

Conferences with First National Bank of Catawba County regarding mortgages - 5 hours

Conferences with Fidelity Federal Savings and Loan Association regarding mortgage - 3 hours

Conferences with attorney for Creditors' Committee, J. Carroll Abernethy, Jr. - 6 hours

Conferences with attorneys for Commercial Credit Business Loans, Inc. in New York including two trips to New York, New York, for the purpose of drafting Plan of Arrangement - 30 hours

Research regarding Chapters X and XI rules - 15 hours

Attending bankruptcy seminar in Atlanta, Georgia - 8 hours

Application and Order extending time for filing the Plan of Arrangement - drafting - 2 hours

Application for ratification of contract between Golden Enterprises, Inc. and Smith Enterprises, Inc., Order and Consent of Creditors' Committee of Golden Enterprises, Inc. - drafting - 2 hours

Application and Orders regarding approval of a new lease for Golden Enterprises, Inc., conferences and drafting documents - 12 hours

Conferences with various creditors regarding Plan of Arrangement - 45 hours

Preparation of Report of acceptance - 30 hours

Redrafting Plan of Arrangement and conferences regarding same - 3 hours

Motion and Order relating to imposition of second mortgage and conferences with bankruptcy office regarding the second mortgage - 4 hours

Drafting Agreement between First-Citizens Bank and Trust Company and Creditors' Committee - 1 hour

Cancellation of Lease Agreements - 1 hour

Agreement between Robert L. McKaughn, Jr., William E. Butner and First-Citizens Bank and Trust Company - 3 hours

Subordination Agreement between Shelby Savings and Loan Association and Golden Enterprises, Inc. - 1/2 hour

Subordination Agreement between First-Citizens Bank and Trust Company and Golden Enterprises, Inc. - 1/2 hour

Two Assignments of Lease Agreements from Golden Enterprises, Inc. to First-Citizens Bank and Trust Company - 1 hour

Assignment of Lease Agreements from Golden Enterprises, Inc. to Shelby Savings and Loan Association - 1/2 hour

Lease Agreement between Golden Enterprises, Inc. and Superior Continental Corporation - 3 hours

Memorandum of Lease Agreement between Golden Enterprises, Inc. and Superior Continental Corporation - 1/2 hour

Application for extension of time to file application for allowance of fees - 1/2 hour

Order extending time for filing application for allowance of fees - 1/2 hour

Application for extension of time to file application for confirmation of the Plan of Arrangement - 1/2 hour

Order extending time for filing of application for confirmation of the Plan of Arrangement - 1/2 hour

Conferences since debtor was notified of National Velvet Plusch, Inc.'s default with the following:

Superior Continental Corporation - 12 hours

General Electric Corporation - 3 hours

First-Citizens Bank and Trust Company - 15 hours

First National Bank of Catawba County - 2 hours

Shelby Savings and Loan Association - 5 hours

Jack Sipe Construction Company - 10 hours

Miscellaneous correspondence - 15 hours

Total hours - 642-1/2

6. That attached hereto and marked "Exhibit A" is a complete list of documents drafted with respect to this proceeding.

7. That the secretary spent the following number of hours typing documents and checking and computing totals for Consents and Proofs of Claims filed:

Number of hours spent at the office - 135 hours

Number of hours spent at home - 50 hours

8. That the following is a list of expenses advanced by the firm of Butner and Gaither for Golden Enterprises, Inc.:

Xerox copies	$	57.50
Long-distance telephone calls		380.00
Clerk of Court		26.00
United States Marshall		7.00
Bankruptcy seminar		
Registration fee - $ 45.00		
Airplane fare - 50.00		
Lodging - 20.00		
Meals - 20.00		135.00

Downtowner East, Charlotte, North Carolina -		
lodging and meals		39.75
Two trips to New York, New York *		
Airplane fare - $206.56		
Miscellaneous expenses		
and meals - 50.00		
Sum advanced to Thomas D.		
Golden - 100.00		356.56

* Golden Enterprises, Inc. paid for the lodging.

Hickory Daily Record - publishing Notice		5.00
Total Expenses Advanced		$1,006.81

I made numerous trips to Charlotte and Statesville, North Carolina, regarding this proceeding; however, in view of the rate being charged, I am not attempting to be reimbursed for these travel expenses.

WHEREFORE, James M. Gaither, Jr., attorney for the debtor, prays the Court that he have and recover attorney fees in the amount of Thirty-two Thousand One Hundred Twenty-five and 00/100 ($32,125.00)

Dollars [based on the rate of Fifty ($50.00) Dollars per hour] and One Thousand Six and 81/100 ($1,006.81) Dollars in expenses advanced.

This the 17th day of December, 1973.

James M. Gaither, Jr., Attorney for the Debtor

Butner and Gaither

Post Office Box 2323

Hickory, North Carolina 28601

Exhibit A

Following is a list of Petitions, Motions, Applications, Orders and miscellaneous correspondence and other work which have been prepared for Golden Enterprises, Inc. since the filing of the petition in bankruptcy:

Petition

Affidavit of Proposed Attorney

Application to Employ Attorney

Application to Stay Enforcement of Liens

Application for Further Time to File Statement of Executory Contracts, Schedules and Statement of Affairs

Order for hearing to confirm sales at the Thomasville, Georgia, and Shelby, North Carolina, locations

Application for Authority to Operate Business

Order Authorizing Operation of Business

Application to Stay Suits

Order Staying Suits

Notice to William Grooh, Application to Restrain William Grooh and Request for Show Cause Hearing, and Order

Two Notices to creditors dated May 17, 1973

Petition to Sell Assets and to Ratify Prior Sale of Assets

Temporary Order Regulating Operation of Debtor's Business

Application to Employ Accountant

Order Authorizing Appointment of Accountant

Order Staying Enforcement of Liens

Preliminary Plan of Reorganization of Golden Enterprises, Inc.

Notice dated August 13, 1973

Consent of Creditor's Committee for lease for building on Highway 64-70, S. W., Hickory, North Carolina, Application for approval of new lease, and Order authorizing Golden Enterprises, Inc. to enter into the lease

Agreement between Golden Enterprises, Inc. and Smith Enterprises, Inc.

Application for ratification of contract between Golden Enterprises, Inc. and Smith Enterprises, Inc., Order and Consent of Creditors' Committee

Order approving extensions for filing plan of arrangement and hearing to confirm the plan of arrangement

Consent to Plan of Arrangement (United States Government)

Consent to Plan of Arrangement (North Carolina Department of Revenue)

Arrangement, Notice of hearing on confirmation of the plan, and letter to creditors of Golden Enterprises, Inc.

Notice dated September 25, 1973

Amended Plan of Arrangement

Agreement between First-Citizens Bank and Trust Company of Hickory, North Carolina, and the

Creditors' Committee of Golden Enterprises, Inc.

Motion and Order for implementation of plan of arrangement

Report

Cancellation of Lease Agreements

Agreement between Robert L. McKaughn, Jr., William E. Butner and First-Citizens Bank and Trust Company

Subordination Agreement between Shelby Savings and Loan Association and Golden Enterprises, Inc.

Subordination Agreement between First-Citizens Bank and Trust Company and Golden Enterprises, Inc.

Two Assignments of Lease Agreements from Golden Enterprises, Inc. to First-Citizens Bank and Trust Company

Assignment of Lease Agreements from Golden Enterprises, Inc. to Shelby Savings and Loan Association

Lease Agreement between Golden Enterprises, Inc. and Superior Continental Corporation

Memorandum of Lease Agreement between Golden Enterprises, Inc. and Superior Continental Corporation

Application for extension of time to file application for allowance of fees

Order extending time for filing application for allowance of fees

Application for extension of time to file application for confirmation of the plan of arrangement

Order extending time for filing of application for confirmation of the plan of arrangement

Miscellaneous correspondence

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

(Caption omitted in printing)

MOTION

James M. Gaither, Jr., attorney for Golden Enterprises, Inc., hereinafter called "Debtor," makes the following motion:

1. That Debtor filed a petition under Chapter XI of the Bankruptcy Act on May 4, 1973.

2. That a Plan of Arrangement (as amended) has been accepted by the requisite number of creditors of Golden Enterprises, Inc. but has not been confirmed by the Court.

3. That January 15, 1974, was set as the confirmation date for the Plan of Arrangement.

4. That following the acceptance of the Plan of Arrangement, several problems developed; that said problems have been outlined in a prior Motion filed with the Court on January 15, 1974.

5. That as a result of the withdrawal of support by First-Citizens Bank and Trust Company, Debtor has been unable to complete Phase II of its real estate project located on Tate Boulevard in Hickory, North Carolina.

6. That Jack Sipe Construction Company and several contractors have prospective labor and materialmen's liens against the property. These liens represent sums owed by Debtor. The total of the claims represented by the respective liens is $210,775.00. This sum includes $69,693.00 to be expended to complete Golden Enterprises, Inc.'s real estate. The sum of $210,775.00 is broken down as follows:

Tate Boulevard Warehouse No. 1

Jack Sipe Construction Company	$ 22,918.00
Miller & Smyre Plumbing & Heating Co.	10,210.00
Henson Electric Company	184.00
Taylor Heating Co., Inc.	600.00

Jack Kincaid, Architect	1,270.00
City of Hickory	4,900.00
Crawford Sprinkler Company	6,421.00
	$ 46,503.00

Tate Boulevard Warehouse No. 2

Jack Sipe Construction Company	$ 90,460.00
Miller & Smyre Plumbing & Heating Co.	600.00
Taylor Heating Co., Inc.	5,495.00
Wiring	12,000.00
Jack Kincaid, Architect	1,236.00
Crawford Door Company	3,324.00
	$ 113,115.00

Tate Boulevard Warehouse No. 3

Jack Kincaid, Architect	$ 1,741.00

Village Plaza Shopping Center

Midstate Contractors, Inc.	$ 9,388.00
Henson Electric Company	2,598.00
Taylor Heating Co., Inc.	2,238.00

Miller & Smyre Plumbing & Heating Co.	8,663.00
Jack Sipe Construction Company	15,083.00
	$ 37,970.00

Leasehold Improvements

$ 11,446.00

7. That Shelby Savings and Loan Association has a first mortgage on Debtor's property located on Tate Boulevard in the original amount of $755,000.00; that approximately $370,000.00 have been advanced; that $399,000.00 remain to be distributed to Debtor upon completion of Phase II; that Shelby Savings and Loan Association has agreed to disburse the remainder to Debtor upon completion of Phase II as follows:

(a) $250,000.00 plus interest in the amount of approximately $17,000.00 to First-Citizens Bank and Trust Company. Upon payment of this sum, First-Citizens Bank and Trust Company agrees to cancel two construction loan deeds of trust in the amounts of $200,000.00 and $50,000.00.

(b) Attorney fee for Butner and Gaither in the amount of $1,964.50 which has been held in escrow since the loan was originally placed on the public records on April 9, 1973.

(c) City of Hickory taxes in the sum of $9,490.41 and Catawba County ad valorem taxes in the sum of $7,689.15.

(d) Remainder of approximately $112,855.94 to be paid to Jack Sipe Construction Company.

8. Following completion and disbursement by Shelby Savings and Loan Association, there will then remain owing to the general and the subcontractors the sum of $97,919.06.

9. William E. Butner and Robert L. McKaughn, Jr. have a second mortgage on all of Debtor's property in the amount of $250,000.00. They have agreed to join Jack Sipe Construction Company for the purpose of completing the real estate and have consented to occupy the position that was originally planned for First-

Citizens Bank and Trust Company, Hickory, North Carolina, by accepting a second mortgage on all of Debtor's real property for the sum of $250,000.00 plus accrued interest plus the total amount of contractors' bills remaining unpaid following completion of Phase II and disbursement by Shelby Savings and Loan Association of the remainder of the first mortgage.

10. That in order to accomplish this, it is necessary to amend the Plan of Arrangement by deleting Article II and substituting in lieu thereof the following:

ARTICLE II

PROVISIONS FOR THE COMPLETION OF DEBTOR'S REAL ESTATE

Pending confirmation, debtor has obtained consents from the following secured creditors to complete a real estate project on Tate Boulevard in Hickory, North Carolina:

(a) Second mortgageholders, William E. Butner and Robert L. McKaughn, Jr.

(b) Jack Sipe Construction Company and subcontractors

(c) First-Citizens Bank and Trust Company

(d) Shelby Savings and Loan Association

(e) Golden Enterprises, Inc.'s Creditors Committee

Following completion of the project and disbursements to contractors and lienholders by Shelby Savings and Loan Association, the debt owing to William E. Butner and Robert L. McKaughn, Jr. shall be consolidated with that of the contractors and a mortgage not to exceed the sum of $360,000.00 shall be placed upon the public records. All other mortgages on any of debtor's property (except first mortgages) shall then be cancelled. This note and deed of trust shall be for not more than the sum of $360,000.00 and amortizable over a period of 15 years upon such terms and conditions to be agreed upon by the second mortgage holders and the Creditors' Committee and as approved by the Court. Such agreement

shall contain provisions regulating the rights of the second mortgage holders with respect to excess cash flow of debtor's Real Estate Division as a means of amortizing the loan. (See "Note B" of the Plan of Arrangement.) The mortgage of the second mortgage holders shall be immediately superior to the mortgage for the unsecured creditors.

11. That the alteration of the plan as set forth in this Motion does not materially or adversely affect the interests of creditors or shareholders.

12. This Motion is made prior to confirmation because time is of the essence, and the Real Estate Division will be seriously damaged if the project is allowed to remain in its uncompleted state.

13. That this Motion is made prior to confirmation and is without notice to unsecured creditors but is made with the consent of the Creditors' Committee and all parties claiming a security interest in Debtor's real estate.

14. That this Motion, if granted, shall directly accrue to the benefit of the unsecured creditors because it will create additional equity in Debtor's real estate for unsecured creditors in the event the Plan of Arrangement is confirmed (a $360,000.00 second mortgage instead of a $460,000.00 second mortgage). In the further event that the plan is not confirmed and the company is adjudicated a bankrupt, the Real Estate Division will be in a position to be sold subject to a first mortgage and a second mortgage rather than piecemeal and without the benefit of completed financing; that the value of the property in its completed state is much greater and will inure directly to the unsecured creditors.

15. That in the event this Motion is allowed, William J. Lawing, a Certified Public Accountant, has offered his services for the sum of $100.00 per month to collect all rents and make all disbursements necessary to accomplish the intent of the Plan of Arrangement.

WHEREFORE, Debtor prays for an order allowing an amendment to the Plan of Arrangement for the purpose of substituting William E. Butner, Robert L. McKaughn, Jr., and Jack Sipe Construction Company as second mortgagees in lieu of First-Citizens Bank and Trust Company for the purpose of completing Debtor's real estate.

This the _____ day of February, 1974.

James M. Gaither, Jr., Attorney

for Debtor

We hereby consent to the foregoing Motion.

/s/ William E. Butner

/s/ Robert L. McKaughn, Jr.

/s/ First-Citizens Bank and Trust Company

/s/ Shelby Savings and Loan Association

(Subject to the conditions as set forth

in Exhibit "A" attached hereto.)

/s/ Jack Sipe Construction Company

/s/ Henson Electric Company

/s/ Miller & Smyre Plumbing & Heating Co.

/s/ Taylor Heating Co., Inc.

/s/ Midstate Contractors, Inc.

Creditors' Committee

By: Chairman

By: Co-Counsel to Creditors' Committee

By: Co-Counsel to Creditors' Committee

EXHIBIT "A"

Shelby Savings and Loan Association of Shelby, N. C., hereby agrees to honor its commitment to Golden Enterprises, Inc., on the following basis:

A. Golden Enterprises, Inc., shall obtain the consent of all parties to that certain Motion providing for completion of Golden Enterprises real estate on Tate Boulevard in Hickory, North Carolina.

B. Golden Enterprises, Inc., shall furnish to Shelby Savings and Loan Association a certificate of title from Butner and Gaither, Attorneys at Law, certifying that the Deed of Trust in the original amount of $755,000.00 from Golden Enterprises, Inc., to Shelby Savings and Loan Associaton and title insurance guaranteeing a first and prior lien on the property described in the instrument and without exception as to 1973 city and county taxes, matters of survey and laborer's and materialmen's liens.

C. A Federal Bankruptcy Court Order authorizing

disbursement of the balance of funds held by Shelby Savings and Loan Association as set forth in the Motion filed in the matter.

D. The assignment of all leases on Phase I and Phase II of the Golden Enterprises, Inc., Tate Boulevard property. The leases shall reflect that the income to be produced during the terms of the leases shall be sufficient to amortize Golden Enterprises, Inc.'s obligations to Shelby Savings and Loan Association as well as to pay a monthly escrow to Shelby Savings and Loan Association of 1/12th of the projected taxes and insurance premiums on the property for the period of the lease terms.

E. All construction to be completed on Phase I and Phase II of the Golden Enterprises, Inc., Tate Boulevard property, as per the Motion filed in this matter with respect to completion and according to plans and specifications. Upon completion and prior to disbursement Golden Enterprises, Inc., shall furnish to

Shelby Savings and Loan Association an architect's certificate of completion.

F. A legal opinion from the attorney of the debtor setting froth the priority of Shelby Savings and Loan Association's lien as it relates to the present Chapter XI proceeding and as it may further relate to any further bankruptcy proceeding under another Chapter of the Bankruptcy Act.

This the 12th day of February, 1974

/s/ Shelby Savings and Loan Association

/s/ Shelby Savings and Loan Association

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

ORDER

This matter is before the Court upon the motion by James M. Gaither, Jr., attorney for Golden Enterprises, Inc. to amend the Amended Plan of Arrangement previously filed in this matter. The Court finds that said modification does not materially and adversely affect the interest of any creditor. It appearing that no notice of a hearing on said motion should be given, and no adverse interest having been represented, and that sufficient reason having been presented, it is

ORDERED that the debtor's motion to amend the Amended Plan of Arrangement be granted; and it is further

ORDERED that Article II of the Amended Plan of Arrangement be deleted and the following Article II

substituted in lieu thereof:

ARTICLE II

PROVISIONS FOR THE COMPLETION OF DEBTOR'S

REAL ESTATE

Pending confirmation, debtor has obtained consents from the following secured creditors to complete a real estate project on Tate Boulevard in Hickory, North Carolina:

(a) Second mortgage holders, William E. Butner and Robert L. McKaughn, Jr.

(b) Jack Sipe Construction Company and subcontractors

(c) First-Citizens Bank and Trust Company

(d) Shelby Savings and Loan Association

(e) Golden Enterprises, Inc.'s Creditors Committee

Following completion of the project and disbursement to contractors and lienholders by Shelby Savings and Loan Association, the debt owing to

William E. Butner and Robert L. McKaughn, Jr. shall be consolidated with that of the contractors and a mortgage not to exceed the sum of $360,000.00 shall be placed upon the public records. All other mortgages on any of debtor's property (except first mortgages) shall then be cancelled. This note and deed of trust shall be for not more than the sum of $360,000.00 and amortizable over a period of 15 years upon such terms and conditions to be agreed upon by the second mortgageholders and the Creditors' Committee and as approved by the Court. Such agreement shall contain provisions regulating the rights of the second mortgage holders with respect to excess cash flow of debtor's Real Estate Division as a means of amortizing the loan. (See "Note B" of the Plan of Arrangement.) The mortgage of the second mortgage holders shall be immediately superior to the mortgage for the unsecured creditors.

This the 14th day of February, 1974.

/s/ Bankruptcy Judge

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

ARRANGEMENT

Golden Enterprises, Inc., the above-named debtor, proposes the following arrangement with its unsecured creditors:

ARTICLE I

PROVISIONS MODIFYING OR ALTERING THE RIGHTS OF UNSECURED CREDITORS

A. The unsecured debts of the debtor are divided into the following classes:

1. All debts which have priority under Section 64a(2), (4), (5) of the Bankruptcy Act.

2. All other debts, including claims arising from the rejection of executory contracts.

B. The unsecured debts of the debtor are treated as follows:

1. All debts included in Class 1 are to be paid in cash in full no later than January 15, 1974, or are to be paid in accordance with such agreement as may be made between any holder of such a debt and the debtor.

2. All debts included in Class 2 shall be settled and satisfied by the payment to the holders thereof of one hundred (100%) per cent of the unsecured indebtedness of debtor by the issuance of non-negotiable certificates of indebtedness to the unsecured creditors, said non-negotiable certificates of indebtedness being payable as follows:

Two and one-half (2-1/2%) per cent being due and payable on or before January 15, 1974, and ninety-seven and one-half (97-1/2%) per cent being due and payable on or before ten (10) years from the date of issuance (upon confirmation of the plan) and bearing no interest for the first five (5) years and bearing interest after five (5) years at the rate of ten (10%) per cent per annum.

Said non-negotiable certificates of indebtedness are to be secured by a mortgage on debtor's real estate for the aggregate amount of the non-negotiable certificates of indebtedness; said non-negotiable certificates of indebtedness, payable to the order of each creditor in Class 2 entitled to participate under Section 367 (3) of said Act, will be deposited for distribution, with such person or persons as the court may designate, within ten (10) days after confirmation of the arrangement; said non-negotiable certificates of indebtedness, payable to the order of each creditor in Class 2 entitled to participate under Section 370 of said Act, will be so deposited within ten (10) days after the allowance of any such debt; and the rights of creditors in Class 2 shall be modified and altered accordingly.

ARTICLE II

PROVISIONS FOR THE COMPLETION OF

DEBTOR'S REAL ESTATE

Subject to confirmation, debtor has obtained financing

needed to complete a major real estate project, thereby creating equity for the mortgage of the unsecured creditors. (See "Note A" for further explanation.) Therefore, upon confirmation debtor shall cause a mortgage in favor of First-Citizens Bank and Trust Company, Hickory, North Carolina, to be placed on the real estate of debtor prior to the mortgage of unsecured creditors. This note and deed of trust shall be for not more than the sum of Four Hundred Sixty Thousand ($460,000.00) Dollars and amortizable over a period of fifteen (15) years upon such terms and conditions to be agreed upon between First-Citizens Bank and Trust Company and the Creditors' Committee of Golden Enterprises, Inc. Such agreement shall contain provisions regulating the rights of the bank with respect to excess cash flow of debtor's Real Estate Division as a means of amortizing the loan. (See attached "Note B" for information regarding projected equity buildup in debtor's real estate.) The mortgage of First-Citizens Bank and

Trust Company shall be superior to the mortgage for the unsecured creditors.

ARTICLE III

PROVISIONS REGARDING OPERATION OF

DEBTOR'S RETAIL OPERATIONS

Until all of the non-negotiable certificates of indebtedness provided for in Article I hereof have been paid in full, the statutory committee of creditors shall have the following supervision and control of the debtor's business:

1. The debtor shall employ an accountant designated by said committee, who shall countersign all checks issued by the debtor, and who shall prepare quarterly operating statements, three (3) copies of which shall be furnished to said committee.

2. The debtor shall not contract any obligation over One Thousand ($1,000.00) Dollars without the prior approval in writing of the chairman of said committee.

3. The debtor shall not fix the salary of any of its

employees without the prior approval in writing of the chairman of said committee.

4. Debtor shall continue to operate at the retail level under existing orders and agreements with secured creditors so as to repay all secured creditors, including the taxing authorities, who have or might claim liens on debtor's inventory no later than January 15, 1974.

5. Debtor shall join in the execution of all documents relating to agreements between the Creditors' Committee and Commercial Credit Business Loans, Inc. regarding the operation of debtor's business until the lien and debt of Commercial Credit Business Loans, Inc. is satisfied.

6. During the term of this arrangement, debtor agrees to operate its Retail Division only so long as it has the express recommendation of the Creditors' Committee to so operate. In the event the Creditors' Committee recommends termination of the debtor's retail

operations following confirmation, debtor agrees to terminate all retail operations within thirty (30) days of receipt of written notice to do so. In the further event that debtor's retail operations are curtailed or are suspended pursuant to recommendations of the Creditors' Committee, debtor agrees to further abide by the regulations of the Creditors' Committee with respect to debtor's operation of its Real Estate Division.

ARTICLE IV

PROVISIONS FOR PAYMENT OF DEBTS INCURRED DURING PENDENCY OF ARRANGEMENT

All debts incurred after the filing of the petition and prior to the confirmation of the arrangement shall be paid in cash in full upon confirmation, except that the time of payment of all or any part of such debts may be extended by agreement with the creditors to whom such debts are due, and such extended debts shall, when due, have priority in payment over the debts affected by this arrangement.

ARTICLE V

PROVISIONS FOR RETENTION OF JURISDICTION

BY THE COURT

The court shall retain jurisdiction until the deposit and distribution of the notes provided for in Article I hereof and the completion of the placement of the second and third mortgage hereinabove referred to on the public records.

ARTICLE V

GENERAL PROVISIONS

The costs and expenses of the proceedings, including allowable expenses of the committee of creditors and administration expenses, are to be paid in cash in full upon confirmation, or are to be paid in accordance with such agreement as may be made between the debtor and any person entitled to be paid such costs and expenses.

Debtor agrees to accept recommendations of the Creditors' Committee for accelerated payments on the

aforesaid non-negotiable certificates of indebtedness in the event the Creditors' Committee determines that the business is in a position to make such payments from time to time during the term of the plan.

GOLDEN ENTERPRISES, INC.

By: (s) Thomas D. Golden

President of said Corporation

Debtor

NOTE A

REAL ESTATE PLAN

Golden Enterprises, Inc. owns real estate with an MAI appraised value in its completed condition of $2.2 million. First mortgages against the property total approximately $1.2 million. At the present time, there is a second mortgage on all property due February, 1974, in the amount of $250,000.00. First-Citizens Bank and Trust Company has a third mortgage in the original amount of $200,000.00.

One of the essential parts of the plan of reorganization is the completion of real estate owned by Golden Enterprises, Inc. and the placement of a third mortgage in favor of all creditors against all real estate in its completed condition. This will be accomplished by the following steps: Golden Enterprises, Inc. owns property which is located on Tate Boulevard in Hickory, North Carolina. There is presently a completed building containing approximately 90,000 square feet and

a building containing approximately 45,000 square feet which is 60% completed. Shelby Savings and Loan Association, a lending institution, has committed $755,000.00 for this project. The sum of $300,000.00 has been used to pay off the 90,000 square foot building. Shelby Savings and Loan Association is holding $455,000.00 which has been committed as follows:

(1) $70,000.00 to pay off a purchase money note and deed of trust on a portion of the property which is due January, 1974.

(2) $250,000.00 to pay off a construction loan at First-Citizens Bank and Trust Company when the second building is completed.

(3) $135,000.00 remaining is to be applied toward the bills of the contractor and the subcontractors.

Because of the increased building costs, as well as work done by the contractors and subcontractors at the Golden Enterprises, Inc.'s shopping center on Fourth Street, S. W., this $135,000.00 is insufficient to pay the

general contractor and all of the subcontractors. The total amount needed to complete the real estate is $245,000.00, leaving the company $110,000.00 short.

Arrangements have been made at First-Citizens Bank and Trust Company, Hickory, North Carolina, to borrow the $110,000.00. This is to be accomplished as follows: First-Citizens Bank and Trust Company will assume the present $250,000.00 second mortgage. It will give to the company a sum not to exceed $110,000.00 to complete the real estate. It will cancel its third mortgage and place the $100,000.00 owed to First-Citizens Bank and Trust Company in with the mortgage so as to have one second mortgage in the original amount of $460,000.00 placed against all of the real estate of Golden Enterprises, Inc.

NOTE "B"

GOLDEN ENTERPRISES, INC.

Cash Projection Commercial Real Estate

Ten Years

	First Year	Second Year	Third Year
CASH PROVIDED BY:			
Gross Rents			
Under present leases	$225,742.30	$225,742.30	$225,742.30
Renewed leases - increases	-	-	-
Total cash provided	$225,742.30	$225,742.30	$225,742.30
CASH APPLIED AGAINST DEBT PAYMENT			
First Mortgages			
First National Bank	$ 11,560.80	$ 11,560.80	$ 11,560.80

Shelby Savings & Loan Assoc.	31,645.08	31,645.08	31,645.08
Shelby Savings & Loan Assoc.	97,359.24	97,359.24	97,359.24
Fidelity Federal Savings & Loan Assoc.	30,402.24	30,402.24	30,402.24
Second Mortgages			
First-Citizens Bank & Trust Co.	44,000.00	44,000.00	44,000.00
Total cash applied against debt	$214,967.36	$214,967.36	$214,967.36
EXCESS CASH FLOW AVAILABLE FOR OPERATING EXPENSES AND INCOME TAXES	$ 10,774.94	$ 10,774.94	$ 10,774.94
ESTIMATED OPERATING EXPENSES AND INCOME TAXES:			
Insurance	$ 1,300.00	$ 1,800.00	$ 1,800.00
Repairs	3,800.00	4,000.00	4,050.00
Property Taxes	4,800.00	6,000.00	6,000.00
Income Taxes	-	-	-
Total estimated operating expenses and taxes	$ 9,900.00	$ 11,800.00	$ 11,800.00
EXCESS CASH FLOW	$ 874.94	$(1,025.06)	$(1,025.06)

	Fourth Year	Fifth Year	Sixth Year
CASH PROVIDED BY:			
Gross Rents			
Under present leases	$225,742.30	$225,742.30	$225,742.30
Renewed leases - increases	2,834.00	4,644.50	4,644.50
Total cash provided	$228,576.30	$230,386.80	$230,386.80
CASH APPLIED AGAINST DEBT PAYMENT			
First Mortgages			
First National Bank	$ 11,560.80	$ 11,560.80	$ 10,597.40
Shelby Savings & Loan Assoc.	31,645.08	31,645.08	31,645.08
Shelby Savings & Loan Assoc.	97,359.24	97,359.24	97,359.24
Fidelity Federal Savings & Loan Assoc.	30,402.24	30,402.24	30,402.24
Second Mortgages			
First-Citizens Bank & Trust Co.	44,000.00	44,000.00	44,000.00
Total cash applied against debt	$214,967.36	$214,967.36	$214 .96
EXCESS CASH FLOW AVAILABLE FOR OPERATING EXPENSES AND INCOME TAXES	$ 13,608.94	$ 15,419.44	$ 16,382.84
ESTIMATED OPERATING EXPENSES AND INCOME TAXES:			
Insurance	$ 2,000.00	$ 2,200.00	$ 2,200.00
Repairs	4,200.00	4,400.00	4,400.00
Property Taxes	6,300.00	6,600.00	6,600.00
Income Taxes	-	-	-
Total estimated operating expenses and taxes	$ 12,500.00	$ 13,200.00	$ 13,200.00

EXCESS CASH FLOW	$ 1,108.94	$ 2,219.44	$ 3,182.84

	Seventh Year	Eighth Year	Ninth Year
CASH PROVIDED BY:			
Gross Rents			
Under present leases	$225,742.30	$225,742.30	$225,742.30
Renewed leases - increases	4,644.50	4,644.50	4,644.50
Total cash provided	$ 230,386.80	$230,386.80	$230,386.80
CASH APPLIED AGAINST DEBT PAYMENT			
First Mortgages			
First National Bank	$ -	$ -	$ -
Shelby Savings & Loan Assoc.	31,645.08	31,645.08	31,645.08
Shelby Savings & Loan Assoc.	97,359.24	97,359.24	97,359.24
Fidelity Federal Savings & Loan Assoc.	30,402.24	30,402.24	30,402.24
Second Mortgages			

First-Citizens Bank & Trust Co.	44,000.00	44,000.00	44,000.00
Total cash applied against debt	$203,406.56	$203,406.56	$203,406.56
EXCESS CASH FLOW AVAILABLE FOR OPERATING EXPENSES AND INCOME TAXES	$ 26,980.24	$ 26,980.24	$ 26,980.24
ESTIMATED OPERATING EXPENSES AND INCOME TAXES:			
Insurance	$ 2,400.00	$ 2,400.00	$ 2,600.00
Repairs	4,600.00	4,600.00	4,800.00
Property Taxes	6,800.00	6,800.00	7,000.00
Income Taxes	*	*	*
Total estimated operating expenses and taxes	$13,800.00	$ 13,800.00	$ 14,400.00

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EXCESS CASH FLOW	$ 13,180.24	$ 13,180.24	$ 12,580.24

190a

	Tenth Year
CASH PROVIDED BY:	
Gross Rents	
Under present leases	$225,742.30
Renewed leases - increases	4,644.50
Total cash provided	$230,386.80
CASH APPLIED AGAINST DEBT PAYMENT	
First Mortgages	
First National Bank	-
Shelby Savings & Loan Assoc.	$ 31,645.08
Shelby Savings & Loan Assoc.	97,359.24
Fidelity Federal Savings & Loan Assoc.	30,402.24
Second Mortgages	
First-Citizens Bank & Trust Co.	44,000.00
Total cash applied against debt	$203,406.56
EXCESS CASH FLOW AVAILABLE FOR OPERATING EXPENSES AND INCOME TAXES	$ 26,980.24
ESTIMATED OPERATING EXPENSES AND INCOME TAXES:	
Insurance	$ 2,600.00
Repairs	4,800.00
Property Taxes	7,000.00
Income Taxes	*
Total estimated operating expenses and taxes	$ 14,400.00

191a

192a

EXCESS CASH FLOW	$ 12,580.24

* Existing operating loss carry-overs will expire during the seventh year, and estimated income tax liabilities beyond the seventh year are unknown.

193a

GOLDEN ENTERPRISES, INC.

Schedule of Equity In Rental Property By Years

	Fair Market Value	Mortgage Balance	Equity
First year	$ 2,271,000.00	$ 1,710,250.00	$ 560,750.00
Second year	2,385,000.00	1,652,182.00	732,818.00
Third Year	2,504,250.00	1,589,518.00	914,732.00
Fourth Year	2,629,463.00	1,520,888.00	1,108,575.00
Fifth Year	2,760,936.00	1,445,541.00	1,315,395.00
Sixth Year	2,898,982.00	1,362,891.00	1,536,091.00
Seventh Year	3,043,932.00	1,272,222.00	1,771,710.00
Eighth Year	3,196,128.00	1,173,722.00	2,022,406.00
Ninth Year	3,355,935.00	1,076,656.00	2,279,279.00
Tenth Year	3,523,732.00	924,759.00	2,598,973.00

194a

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA-STATESVILLE DIVISION

(Caption omitted in printing)

ORDER

THIS CAUSE coming on to be heard and being heard before the Honorable Joseph R. Cruciani, Bankruptcy Judge, at Charlotte, North Carolina, on April 17, 1974, upon the Motion of William E. Butner, Robert L. McKaughn, Jr., and Jack Sipe Construction Company relating to the terms of the secondary deed of trust on property of Golden Enterprises, Inc. to secure the debt to the movants in the approximate sum of $360,000.00;

And it appearing that the excess cash flow is incapable of amortizing the $360,000.00 debt over a 15-year period at the present time;

And it further appearing that when Phase II is leased for approximately $1.25 per square foot per annum, there will be sufficient cash flow to pay interest as it accrues;

And it further appearing that movants have agreed

not to attempt to foreclose said deed of trust without approval of the Court;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

(1) That the note and deed of trust from Golden Enterprises, Inc. to William E. Butner, Robert L. McKaughn, Jr., and Jack Sipe Construction Company shall be in the original amount of $360,000.00 and shall be due on demand and shall bear interest at the rate of 10% per annum until paid in full.

(2) That any attempt to amend the amount of the note and deed of trust shall be by motion before this Court and upon notice to all parties claiming an interest in Golden Enterprises, Inc.'s real estate.

(3) That the holders of the note or any assignee thereof shall not attempt to file a petition to reclaim or to foreclose except upon motion to this Court setting forth the reasons therefor.

This the 17th day of April, 1974.

/s/ Joseph R.Cruciani

Bankruptcy Judge

PROOF OF CLAIM FOR INTERNAL REVENUE TAXES

BANKRUPTCY ACT PROCEEDINGS

IN THE DISTRICT COURT

FOR THE WESTERN DISTRICT OF N. C.

(Caption omitted in printing)

CLAIM OF THE UNITED STATES

FOR INTERNAL REVENUE TAXES

TAXPAYER's IDENTIFYING NUMBER:

Social Security No. _____

Employer Identification No. 56-0929458

The undersigned officer of the Internal Revenue Service, a duly authorized agent of the United States in this behalf, declares that:

1. The debtor is justly and truly indebted to the United States in the sum of $47,504.38.

2. The said debt is for taxes due under the internal revenue laws of the United States as follows:

A. LIEN CLAIMS (Notice of Federal Tax Lien filed prior to Bankruptcy Petition date)

KIND OF TAX	PERIOD	AMOUNT DUE	REMARKS	DATE NOTICE OF TAX LIEN FILED
				5/21/73

B. PRIORITY CLAIMS

KIND OF TAX	PERIOD	AMOUNT DUE	REMARKS	DATE TAX ASSESSED
WT-FICA	3/31/73	$ 39,390.90		6/4/73
Interest to 5/4/73		26.26		
FUTA	12/31/72	2,601.10		6/26/73
Interest to 5/4/73		40.32		
FUTA	1/1/73 thru 5/4/73	5,445.80		
		Total $47,504.38		

C. UNSECURED CLAIMS

KIND OF TAX	PERIOD	AMOUNT DUE	REMARKS	DATE TAX ASSESSED

NOTE: This amends and replaces proof of claim filed July 12, 1973, and reflects a decrease in tax liability due to credits being applied to the 6/30/73 941 account.

3. No part of said debt has been paid and it is now due and payable at the Office of the District Director of Internal Revenue;

4. There are no set-offs or counterclaims to said debt;

5. Except for the tax liens protected by notices of lien filed on the date above, the United States does not hold, to my knowledge or belief, any security or securities for said debt;

6. No note or other negotiable instrument has been received for said debt or any part thereof, nor has any judgment been rendered with respect to said debt; and

7. Said debt is to be paid to the extent provided by law. See sections 17, 64, 77e, 199, 337(2), 455, and 659 of the Bankruptcy Act (11 U.S.C. 35, 104, 205(c), 599, 737(2), 855 and 1059).

/a/ Albert Bunton

February 4, 1974

Chief, Special Procedures Staff

Address

Internal Revenue Service

P. O. Box 20541

Greensboro, North Carolina 27420

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA-STATESVILLE DIVISION

(Caption omitted in printing)

MOTION

JAMES M. GAITHER, JR., attorney for Golden Enterprises, Inc., makes the following Motion unto the Court:

That Golden Enterprises, Inc. is out of business and has no income other than rental income; that Golden Enterprises, Inc. has only one employee still on the payroll; that mortgage and interest payments are presently in arrears in varying amounts; that several secured parties including Shelby Savings and Loan Association, Jack Sipe Construction Company, William E. Butner and Robert L. McKaughn, Jr., as well as the Creditors' Committee, have requested that the income derived from rentals, as well as the books and records of the company with regard to its real estate, be placed in the hands of a court-appointed individual with directions to

collect the rents, make all mortgage payments, pay taxes, insurance, and repairs and accumulate excess cash flow for the benefit of secondary lienholders and the unsecured creditors.

WHEREFORE, James M. Gaither, Jr. moves the Court for an Order appointing a named individual to function as agent in collecting rental income of Golden Enterprises, Inc. and applying the funds to those debts approved for payment by this Court.

This the 17th day of April, 1974.

/s/ James M. Gaither, Jr.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA-STATESVILLE DIVISION

(Caption omitted in printing)

ORDER

THIS CAUSE coming on to be heard and being heard before the Honorable Joseph R. Cruciani, Bankruptcy Judge, at Charlotte, North Carolina, on April 17,1974, upon Motion by James M. Gaither, Jr., attorney for debtor, to appoint an individual to act for the Court and the debtor in the collection and application of rental income of debtor;

And it appearing that it is in the best interest of debtor and all creditors to appoint an agent to collect rents and to apply the proceeds under the supervision of the Court;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

(1) That SIMON JOSEPH GOLDEN is hereby appointed by this Court to receive all income derived from debt-

or's real estate and that Golden Enterprises, Inc. is directed to turn over all real estate monies on hand to SIMON JOSEPH GOLDEN immediately following the signing of this Order, and the filing with this court of a $40,000.00 bond.

(2) That SIMON JOSEPH GOLDEN (hereinafter called agent) shall promptly deposit all monies received in a separate agency account in First Citizens Bank & Trust, notify all tenants where rents are to be sent and a ledger card is to be maintained on each tenant.

(3) That agent shall apply income received to the following debts of the corporation:

1. Federal and State Income Tax, if any,

2. Monthly mortgage payments to First National Bank of Catawba County, Fidelity Federal Savings and Loan Association, and Shelby Savings and Loan Association (two loans),

3. Ad valorem property taxes,

4. Fire insurance premiums, and

5. Interest and principal on secondary mortgages.

(4) That agent shall file a monthly report with the Court with copies to Golden Enterprises, Inc., the Creditor's Committee, Commercial Credit Business Loans, Inc., and second mortgage holders showing all receipts and expenditures and accumulations.

(5) That as compensation, agent shall receive the sum of -0- per month.

This the 18th day of April, 1974.

/s/ Joseph R. Cruciani

Bankruptcy Judge

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

APPLICATION FOR FEES AND EXPENSES

Now comes James M. Gaither, Jr., attorney for the debtor, and continues his Application for Fees and Expenses in the matter of Golden Enterprises, Inc. by stating that he has done the following matters and things in his capacity as attorney for the debtor from December 18, 1973, through May 20, 1974:

Date	Description	Number of Hours
12/18/73	Drafting letter regarding American Iwer Corporation's lien	1/2
	Conference regarding lien of American Iwer Corporation	1/6
	Drafting Subordination Agreement between William E. Butner and Robert L. McKaughn, Jr. and Golden Enterprises, Inc. for the Superior Continental Lease Agreement; related conferences with Lester Key	2-1/2
12/27/73	Drafting letter regarding Crestline Division of Federal Steel Corporation and its Proof of Claim	1/2
12/28/73	Drafting letter to Thomas D. Golden regarding loan from William E. Butner and Robert L. McKaughn, Jr.	1/6
12/28/73- 1/01/74	Conferences with Commercial Credit Business Loans, Inc. regarding proceeds of Christmas sales and Smith Enterprises, Inc.'s commissions	7
	Conferences with Commercial Credit Business Loans, Inc. and Matshushita Electric Corporation of America regarding Panasonic's claim; attending hearings regarding the claim of Matshushita Electric Corporation of America	6

1/04/74	Drafting letter to G. Dean Whisnant, Shelby Savings and Loan Association	1/6
1/08/74	Drafting letter to Creditors' Committee regarding financing for Golden Enterprises, Inc.	1/2
1/08/74	Conference with Eric Jorgensen, Internal Revenue Service	1
1/10/74	Conferences with C. B. Cash, Attorney for Shelby Savings and Loan Association, and the purchase money mortgage holders regarding advancing payment of $70,000.00	2-1/2
1/11/74	Drafting Order regarding disbursement of monies by Shelby Savings and Loan Association	3/4
1/14/74	Drafting Reply to Application of Matshushita Electric Corporation of America for Further Relief	1/2
1/15/74	Attending show cause hearing	3

1/16/74	Drafting letter to Golden Enterprises, Inc.	1/6
1/16/74	Conference with Thomas D. Golden regarding Shelby Savings and Loan Association's financing	2
1/17/74	Research regarding deposit under proposed Plan of Arrangement	1
1/18/74	Drafting letter to Arthur I. Winard regarding amending the Plan of Arrangement	3/4
1/23/74	Conference in Bankruptcy Court	1/2
1/24/74	Conference with Bankruptcy Court regarding filing of schedules	1/2
	Drafting Motion regarding amending Plan of Arrangement to complete debtor's real estate	2
	Research	2
1/29/74	Conference with Golden Enterprises, Inc.	2

1/30/74	Conference regarding claim of Matshushita Electric Corporation of America	1-1/2
	Searching public records in the offices of the Clerk of Court, Register of Deeds and Tax Collectors for the City of Hickory and County of Catawba	1
	Conferences with general contractors, subcontractors, William E. Butner, and Robert L. McKaughn, Jr. regarding completion of Golden Enterprises, Inc.'s real estate (during the months of January and February)	15
2/05/74	Conferences with Golden Enterprises, Inc. regarding closing of stores	2
2/06/74	Conferences with Golden Enterprises, Inc. and Creditors' Committee regarding completion of real estate	2
2/07/74	Letter to Joan Harris regarding schedules	1/2

2/08/74	Conference with Golden Enterprises, Inc. regarding Commercial Credit Business Loans, Inc.	1-1/2
2/11/74	Conference with Golden Enterprises, Inc. regarding letter from Creditors' Committee pertaining to inventory of debtor	1-1/2
2/12/74	Conference with insurance agent	1
2/12/74	Drafting Statement of Affairs	2-1/2
2/12/74	Assembling information and drafting Statement of Executory Contracts	2-1/2
2/14/74	Drafting Motion and Order continuing the date of confirmation hearing	1-1/2
2/14/74	Drafting Motion and Order to substitute the second mortgage holders	2
2/14/74	Hearing regarding Golden Enterprises, Inc.	4
2/28/74	Letters to Internal Revenue Service regarding tax claims; letters to Creditors' Committee	2

2/01/74- 2/28/74	Conferences with Jack Sipe, W. George Huffman and Shelby Savings and Loan Association regarding completion of real estate	5-1/2
	Conferences with William E. Butner and Robert L. McKaughn, Jr.	2
	Conference with Commercial Credit Business Loans, Inc.	1
	Conferences with Golden Enterprises, Inc.	5
	Conferences with First-Citizens Bank and Trust Company and E. Murray Tate, Jr.	1-1/2
	Conference with Camp Enterprises, regarding offer on purchase of inventory	2
3/05/74	Drafting letter to Joseph H. Frier, Jr.	1/2
3/08/74	Conference with J. Carroll Abernethy, Jr.	3/4

3/07/74	Drafting Disbursement Order	2
3/07/74	Drafting letter to Joseph H. Frier, Jr.	1/2
3/08/74	Drafting letter to Joseph H. Frier, Jr.	1/2
3/08/74	Drafting letter to J. S. Meares, First-Citizens Bank and Trust Company	1/6
3/08/74	Drafting letter to R. G. Sipe	1/6
3/08/74	Conference with Golden Enterprises, Inc.	1
3/11/74- 3/15/74	Conferences with Richard Woodbury regarding lease of Phase II property on Tate Boulevard; drafting lease requirements	2-1/2
3/12/74	Drafting letter to Arthur I. Winard	1/2
3/12/74	Drafting letters to creditors	1/2
3/12/74	Drafting report and letter to Bankruptcy Court	1
3/12/74	Drafting letter to C. B. Cash, Jr., attorney for Shelby Savings and Loan Association	1/6

3/13/74	Conferences and research regarding Internal Revenue Service tax claims	2
3/14/74	Drafting letters to creditors	3/4
3/18/74-3/22/74	Conferences with Golden Enterprises, Inc. regarding offers to purchase inventory	3-1/2
3/25/74	Drafting Application and Order to Stay Suits	1-1/2
3/25/74	Conference regarding sale of inventory	1
3/26/74	Drafting letter to Joseph H. Frier, Jr.	1/6
4/01/74	Conference with Golden Enterprises, Inc. regarding offers to purchase inventory	1-1/2
4/03/74	Conference regarding rent for store	1/2
4/04/74	Drafting letter to creditor	1/6
4/05/74	Research and conference regarding offers to purchase inventory	2-1/2
4/06/74	Reviewing letter from Golden Enterprises, Inc.	1/2

4/11/74	Reviewing letter from California creditor	1/2
4/15/74-4/19/74	Conferences with Gordon Bros., Inc.	2
4/15/74-4/19/74	Conferences with Golden Enterprises, Inc., Commercial Credit Business Loans, Inc., Gordon Bros., Inc., and Silverman Sales Enterprises, Inc.	25
4/16/74	Drafting Motion and Order Appointing Attorneys for Creditors' Committee	1/2
4/17/74	Drafting Application to Sell Real Estate	1/2
4/17/74	Drafting Motion and Order for Shelby Savings and Loan Association	1-1/2
4/17/74	Drafting Motion and Order regarding terms of second mortgage	1-1/2
4/17/74	Hearing in Charlotte, North Carolina	4
4/17/74	Drafting Motion and Order to appoint agent to collect and disburse rental income	1/2

4/18/74	Letters to creditors	1/2
4/18/74	Conference with Bankruptcy Court	1/2
4/19/74	Drafting letter to Marine Midland Leasing Corporation and conference with Marine Midland Leasing Corporation	1/2
4/21/74	Negotiation of contract between Golden Enterprises, Inc. and Silverman Sales Enterprises, Inc. held in Charlotte, North Carolina	10
4/22/74	Trip to Charlotte, North Carolina, regarding sale of inventory	6
4/22/74	Drafting Order to Sell Real Estate	1/2
4/22/74	Conference with Morris Macey	1
4/24/74-4/26/74	Drafting Order to file application to sell property free and clear of liens and to file adversary proceeding and appropriate Orders; drafting Complaint	5
4/29/74	Drafting letter to Manning Silverman	

	regarding Order approving sale of inventory to Silverman Sales Enterprises, Inc.	1
4/29/74	Drafting letter to Commercial Credit Business Loans, Inc; conference with Commercial Credit Business Loans, Inc.	1
4/29/74	Drafting letter to First-Citizens Bank and Trust Company; conference with First-Citizens Bank and Trust Company	1/2
4/29/74	Drafting letter to Shelby Savings and Loan Association; conference with Shelby Savings and Loan Association	1/2
4/29/74	Conference with Joseph H. Frier, Jr.	1/4
5/06/74-5/10/74	Conferences regarding adversary proceeding and research on adversary proceeding	5
5/09/74	Drafting letters to Harold Dennis; conferences with Harold Dennis	3

5/09/74	Conference with Joe Golden	1-1/2
5/10/74	Conference with Joe Golden	1/2
5/13/74-	Conference with Internal Revenue	
5/17/74	Service	1-1/2
5/13/74-	Conference with Marine Midland	
5/17/74	Leasing Corporation	1/2
5/13/74-	Conferences with Manning Silverman	
5/17/74	and Harold Dennis relative to sale of	
	inventory of Golden Enterprises, Inc.	4
5/13/74-	Conferences with Creditors' Commit-	
5/17/74	tee regarding making it a party to	
	Complaint in adversary proceeding;	
	filing Affidavit and Motion in ad-	
	versary proceeding	1-1/2
5/13/74-	Conferences with Shelby Savings	
5/17/74	and Loan Association regarding com-	
	pletion of real estate	4
5/13/74-	Conferences with W. George	
5/17/74	Huffman	1-1/2

5/13/74-	Conferences with First-Citizens	
5/17/74	Bank and Trust Company and Joe	
	Golden regarding changing bank	
	account	1
5/13/74	Hearing on adversary proceeding	3
5/15/74	Drafting Application and Order ex-	
	tending time for filing Application	
	for Fees and Expenses	1/2
5/15/74	Drafting Notice of May 29, 1974,	
	hearing (secretarial time address-	
	ing envelopes and preparing for	
	mailing - 8 hours)	1/2
5/16/74	Conference with Bankruptcy Office	1
5/20/74	Drafting letters and Certificate of	
	Mailing	1/4
5/20/74	Drafting letter to Charles S. Powell,	
	State of California Employment De-	
	velopment Department	1/2
5/20/74	Drafting Amendment to Complaint	
	filed in the adversary proceeding	1/2

During the months of March, April and May, 1974, the attorney for the debtor had to do the following to allow the substitution of the second mortgage holders and completion of the real estate of Golden Enterprises, Inc.:

Description	Number of Hours
Draft legal opinion relative to the rights of Shelby Savings and Loan Association	8-1/2
Examination of public records in the offices of the Clerk of Court, Register of Deeds and Tax Collectors for the City of Hickory and County of Catawba; drafting Certificate of Title	12
Obtaining title insurance	4
Conference with First-Citizens Bank and Trust Company	1-1/2
Conference with Board of Directors of Shelby Savings and Loan Association	3
Drafting Assignment of Lease Agreements between Golden Enterprises, Inc. and Superior Continental Corporation and Golden Enterprises, Inc. and William E. Butner, Robert L. McKaughn, Jr., and Jack Sipe Construction Company	1/2
Drafting Lease Agreement on Phase II of Tate Boulevard property between Golden Enterprises, Inc. and William E. Butner, Robert L. McKaughn, Jr., and Jack Sipe Construction Company	1-1/2
Conferences with R. G. Sipe, William E. Butner, and Robert L. McKaughn, Jr. regarding the Lease Agreement for Phase II of the Tate Boulevard property	4
Conferences with R. G. Sipe, William E. Butner, and Robert L. McKaughn, Jr. regarding rights to cash flow and principal	5
Conferences with R. G. Sipe, William E. Butner, and Robert L. McKaughn, Jr. regarding terms of the second deed of trust	5

Total hours through May 20, 1974		256-1/2
Total hours (Schedule A)		150
TOTAL HOURS		406-1/2
Total expenses advanced (Schedule B)	$	828.32
Total expenses to be advanced (Schedule C)		405.00
TOTAL EXPENSES	$	1,233.32

WHEREFORE, James M. Gaither, Jr., attorney for the debtor, prays the Court that he have and recover attorney fees in the amount of THIRTY-TWO THOUSAND ONE HUNDRED TWENTY-FIVE and 00/100 ($32,125.00) DOLLARS [based on the rate of Fifty ($50.00) Dollars per hour] and ONE THOUSAND SIX and 81/100 ($1,006.81) DOLLARS in expenses advanced from the Application filed in December, 1973, and that he have and recover attorney fees in the amount of TWENTY THOUSAND THREE HUNDRED TWENTY-FIVE and 00/100 ($20,325.00) DOLLARS [based on the rate of Fifty ($50.00) Dollars per hour] and ONE THOUSAND TWO HUNDRED

THIRTY-THREE and 32/100 ($1,233.32) DOLLARS in expenses from this Application for Fees and Expenses.

This the 27th day of May, 1974.

/s/ James M. Gaither, Jr.

Attorney for Debtor

Post Office Box 2323

Hickory, North Carolina 28601

SCHEDULE A

The attorney for the debtor estimates that he will need to allow approximately 150 hours for the following matters:

(1) Drafting Order for Appointment of Disbursement Agent

(2) Trial and negotiations on Complaint filed in the adversary proceeding

(3) Conferences with Internal Revenue Service and related taxing authorities relative to tax claims

(4) Adversary proceeding to sell shopping center and warehouse

(5) Drafting second mortgage on real estate and negotiations related thereto

(6) Conferences and drafting amendments to Plan of Arrangement necessary for confirmation

SCHEDULE B

Expenses Advanced

Date		Amount
5/04/73 - 5/17/74	Travel expenses*	$ 391.20
12/15/73 - 5/17/74	Xerox copies	124.50
11/16/73 - 5/17/74	Long-distance telephone calls	286.81
5/14/74	Register of Deeds for Catawba County for recording fees	10.00
5/15/74	Quick Copies of Hickory for copies of Notice of Hearing on Applications for Fees and Expenses on May 29, 1974	13.52

5/15/74	Carolina Office Equipment Company for labels for envelopes for Notice of Hearing on Applications for Fees and Expenses on May 29, 1974	2.29
		$ 828.32

* 25 trips to Charlotte, North Carolina (110 miles at $ .12 per mile)

6 trips to Shelby, North Carolina (85 miles at $ .12 per mile)

SCHEDULE C

Estimated Expenses to be Advanced

The attorney for the debtor estimates that he will need to advance the following amounts of money between the date of filing the Application for Fees and Expenses and the date of confirmation of the Plan of Arrangement:

Description	Amount
Travel expenses	$ 80.00
Xerox copies	50.00
Long-distance telephone calls	50.00
Quick Copies of Hickory for copies of Amended Plan of Arrangement, Consent, and Letters	225.00
Total Estimated Expenses to be Advanced	$405.00

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF

NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

DISBURSEMENT ORDER

THIS CAUSE coming on to be heard and being heard before the Honorable Joseph R. Cruciani, Bankruptcy Judge, in chambers and without notice to creditors, and it appearing to the Court that a Motion has been filed to amend the Amended Plan of Arrangement to substitute the contractor and the second mortgage holders in place of First-Citizens Bank and Trust Company which has withdrawn its support from the original Plan of Arrangement; and it further appearing that an Order has been entered amending the Amended Plan of Arrangement to provide for the completion of debtor's real estate located on Tate Boulevard in Hickory, North Carolina; and it further appearing to the Court that

the secured creditors involved in the real estate completion have consented to the Motion filed on February 14, 1974; and it further appearing that this Court on February 14, 1974, instructed debtor to prepare a Consent Order of Disbursement based on the allegations in the Motion filed on February 14, 1974; and it further appearing that all interested parties have consented to this Disbursement Order for the purpose of allowing the contractors to begin completion of construction.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

(1) Jack Sipe Construction Company and its subcontractors are hereby authorized to begin completion of construction of Phase II of Golden Enterprises, Inc.'s real estate located on Tate Boulevard in Hickory, North Carolina.

(2) Upon completion and prior to disbursement, Golden Enterprises, Inc. shall

furnish to Shelby Savings and Loan Association an architect's certificate of completion according to plans and specifications. The architect in this matter is Jack Kincaid of Newton, North Carolina.

(3) Following completion and furnishing of the certificate, Shelby Savings and Loan Association shall disburse the sum of approximately Three Hundred Ninety-Nine Thousand ($399,000.00) Dollars (the balance remaining on the loan commitment) as follows:

(a) Two Hundred Fifty Thousand ($250,000.00) Dollars plus accrued interest to First-Citizens Bank and Trust Company, Hickory, North Carolina, in full satisfaction of two construction loan

deeds of trust against the Phase II Property.

(b) One Thousand Nine Hundred Sixty-Four and 50/100 ($1,964.50) Dollars to Butner and Gaither, Attorneys at Law, for an attorney fee for the original title search for Seven Hundred Fifty-Five Thousand ($755,000.00) Dollar first mortgage.

(c) City and County ad valorem property taxes.

(d) Remainder to Jack Sipe Construction Company.

IT IS FURTHER ORDERED that following completion and disbursement by Shelby Savings and Loan Association that the amount paid to Jack Sipe Construction Company in paragraph (d) above be subtracted from the sum of Two Hundred Ten Thousand Seven Hundred Seventy-Five ($210,775.00) Dollars and this sum shall

be combined with the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars presently owed by Golden Enterprises, Inc. to William E. Butner and Robert L. McKaughn, Jr., and a note and deed of trust shall be executed from Golden Enterprises, Inc. to Jack Sipe Construction Company, William E. Butner and Robert L. McKaughn, Jr. The terms of the mortgage shall be as follows: The note and deed of trust shall be for not more than the sum of Three Hundred Sixty Thousand ($360,000.00) Dollars unless so authorized by the Court and shall be amortizable over a period of fifteen (15) years at an interest rate to be determined by the Court prior to the placement of the second mortgage in favor of Jack Sipe Construction Company, William E. Butner and Robert L. McKaughn, Jr. on the public records.

IT IS FUTHER ORDERED that the debtor retain the services of a Certified Public Accountant or other individual approved by the Court for the purpose of

collecting rents and making disbursements to the first mortgage holders and the second mortgage holders following completion of the real estate.

This the 8th day of May, 1974.

/s/ Joseph R. Cruciani

Joseph R. Cruciani, Bankruptcy

Judge

We hereby consent to the foregoing Disbursement Order.

/s/William E. Butner (SEAL)

William E. Butner

/s/Robert L. McKaughn, Jr. (SEAL)

Robert L. McKaughn, Jr.

FIRST-CITIZENS BANK AND TRUST COMPANY

By: /s/J. S. Meares, SR. V.P.

SHELBY SAVINGS AND LOAN ASSOCIATION

By: /s/Lowery Austell, President

JACK SIPE CONSTRUCTION COMPANY

By: /s/R. G. Sipe, President

HENSON ELECTRIC COMPANY

By: /s/George L. Henson

MILLER & SMYRE PLUMBING & HEATING CO.

By: /s/Thomas D. Smyre

TAYLOR HEATING CO.,INC.

By: /s/Ronald M. Taylor, Jr.

MIDSTATE CONTRACTORS, INC.

By: /s/Kenneth L. Ferguson

CREDITORS'COMMITTEE

By: /s/George J. Salow (SEAL)

Chairman

by: /s/Goldman, Frier & Altesman(SEAL)

Co-Counsel to Creditors' Committee

By: /s/Arthur I. Winard (SEAL)

Co-Counsel to Creditors' Committee

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

APPLICATION FOR FEES

Honorable Joseph R. Cruciani, Bankruptcy Judge:

We, hereby submit request for payment in the amount of $4,137.25 for services rendered in regard to Golden Enterprises, Inc. Our services rendered pertain to those services performed subsequent to date of Declaration of Bankruptcy and the date which the bankruptcy was ratified by the court and also services performed subsequent to ratification by the court.

All services performed are set forth in detail on the attached statement.

Very truly yours,

LAWING, ROWE & COMPANY

WJL/ab

Enclosure

GOLDEN ENTERPRISES, INC.

Post Office Box 3

Hickory, North Carolina 28601

STATEMENT OF SERVICES RENDERED:

6/29/73 Preparation of initial cash forecast on commercial real estate

13 hrs. at 20.00	$ 260.00
4-1/2 hrs. at 10.00	45.00
	$ 305.00

Assistance in bringing books up to date and preparation of unaudited balance sheets, statement of affairs and deficiency statements at May 4, 1973

79-1/2 hrs. at 20.00	$1,590.00
3 hrs. at 10.00	30.00
	1,620.00
Xerox copies	30.00
Telephone calls	1.00

	$ 1,956.00
Less amounts paid by company (11/26/73)	158.75
	$ 1,797.25

4/29/74 Preparation of second cash forecast for proposed refinancing of real estate and other services related thereto

10-1/2 hrs. at 25.00	$ 263.00
6 hrs. at 8.00	48.00
	$ 311.00

Preparation of Federal and state income tax returns for the year ended June 30, 1973 and assistance with bringing books up to date

1 hr. at 25.00	$ 25.00
134 hrs. at 14.00	1,904.00
5-1/2 hrs. at 10.00	55.00
5 hrs. at 8.00	40.00

	2,024.00	
Xerox copies	5.00	2,340.00
Total amount		$ 4,137.25

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

SUPPLEMENT TO PETITION FOR ATTORNEY'S FEES FOR THE ATTORNEYS OF CREDITORS' COMMITTEE

TO THE HONORABLE JOSEPH R. CRUCIANI, Bankruptcy Judge:

J. Carroll Abernethy, Jr., one of the Attorneys for the Creditors' Committee respectfully shows unto the Court:

1. That the said J. Carroll Abernethy, Jr., attended the following meetings or hearings in the Bankruptcy Court at Charlotte, N. C., each of which took at least one-half day from the time he left his office until he returned to his office, and consisted of a round-trip of at least 100 miles. The hearings he attended were on the following dates:

June 13, 1973

June 26, 1973

September 25, 1973

October 10, 1973

October 25, 1973

January 15, 1974

February 14, 1974

April 17, 1974

2. In addition, on or about May 13, 1974 the said J. Carroll Abernethy, Jr. prepared for filing an Affidavit and Consent for the Creditors' Committee to be made party to the Adversary Proceeding presently before the Court.

3. In addition the said J. Carroll Abernethy, Jr. plans to be present for the hearing to be held in Charlotte, N. C. on May 29, 1974 and the hearing to be held July 31, 1974.

4. In addition to the above matters the said J. Carroll Abernethy, Jr. has had numerous conferences

with Mr. James M. Gaither, Jr., Attorney for the Bankrupt; First-Citizens Bank & Trust Company; Attorney George Huffman, who represents Jack Sipe Construction Company, with numerous creditors, both by telephone and correspondence and correspondence and telephone conversations with the other attorneys for the Creditors' Committee in New York, as well as correspondence and conversations with the Office of the Judge in Bankruptcy and with creditors.

In the opinion of the said J. Carroll Abernethy, Jr. there will be other hearings or meetings to be held which he will be obligated to attend and will have additional telephone conversations and correspondence with the other attorneys for the Creditors' Committee, the attorneys for the Bankruptcy creditors and the Court in the future.

Respectfully submitted, this 29th day of May, 1974.

/s/ J. Carroll Abernethy, Jr.
Attorney for the Creditors' Committee
P. O. Box 1492
Telephone # 322-1060
Hickory, North Carolina 28601

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GOLDEN ENTERPRISES, INC.

Statement of Cash Receipts and Disbursements

May 1 to May 31, 1974

Cash balance, beginning			$ 944.86
Cash receipts:			
5-01	CIT Financial Services	$ 487.50	
5-02	Beltone	538.87	
5-03	Superior Continental	8,816.66	
5-08	Iron Gate Restaurant	652.44	
5-13	Travels by Golden	325.00	
5-13	Customer Deposit	9.50	
5-29	Casa de Bonita Beauty Salon	538.42	11,368.39
Cash available			$ 12,313.25
Cash disbursements:			
5-03	First Security Company	$ 160.00	
5-03	Shelby Savings and Loan Association	2,637.09	
5-08	Shelby Savings and Loan Association	3,337.42	
5-08	Fidelity Federal Savings and Loan	2,533.52	
5-10	William E. Butner	2,000.00	
5-14	City of Hickory	13.06	
5-22	Duke Power Company	98.25	
5-29	City of Hickory	6.53	
5-31	Refund of Customer Deposit	9.50	
5-31	Bank Charges - Checks	9.65	10,805.02

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Cash balance, ending $ 1,508.23

To the best of my knowledge, the information furnished above is a true and correct statement.

/s/ Joe Golden, Agent

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

APPLICATION FOR INTERIM ALLOWANCE OF

COMPENSATION AND REIMBURSEMENT OF

EXPENSES

To the Honorable Joseph R. Cruciani, United States Bankruptcy Judge:

The application of James M. Gaither, Jr., respectfully represents:

1. Your applicant is the attorney for Golden Enterprises, Inc., the above-named debtor.

2. Your applicant has performed his duties as attorney for the debtor on almost a full-time basis, with such duties requiring many eight-hour days, and on many days extending late into the night. The continued administration of this estate by your applicant will continue to require almost full-time attention to the

business of the debtor's estate over an extended period of time.

3. If your applicant must wait for payment of compensation for his services until this proceeding is finally terminated, it will work a hardship on him, as such proceeding may continue for a number of months.

4. Upon the basis of the services rendered by him, applicant seeks an allowance for interim compensation in the amount of Fifteen Thousand ($15,000.00) Dollars. Your applicant seeks the payment of such compensation to him as partial compensation for the administration of debtor's estate.

5. Attached hereto as Exhibits A and B are detailed statements of proper costs and expenses incurred in this proceeding by your applicant from May 4, 1973, the date of the filing of the petition under Chapter XI of the Bankruptcy Act, to the date of this application.

6. There will be sufficient monies available from the sale of inventory and real estate to pay the interim compensation to your applicant.

WHEREFORE, your applicant prays that he be allowed interim compensation from the estate of the debtor as a part of the costs and expenses of the administration thereof, in the amount stated above, or such other amount as the Court shall deem fair and reasonable; and that he be allowed and authorized reimbursement for proper costs and expenses incurred by him in this proceeding in the amount shown on the exhibits attached hereto.

This the 31st day of May, 1974.

/s/ James M. Gaither, Jr., Applicant

(Verification omitted in printing)

(Jurat omitted in printing)

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

ORDER

THIS CAUSE coming on to be heard and being heard before the Honorable Joseph R. Cruciani, Bankruptcy Judge, upon the written Application for Fees and Expenses of James M. Gaither, Jr.; and it appearing to the Court that the reasonable value of services rendered by James M. Gaither, Jr. through the 17th day of July, 1974, is $34,443.75 and that the total of the expenses advanced by the firm of Butner and Gaither through the 17th day of July, 1974, is $2,240.13;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that James M. Gaither, Jr., attorney for the debtor, be and he is hereby allowed the sum of $34,443.75 as attorney fees and $2,240.13 for expenses advanced through the 17th day of July, 1974,

in the above-referred-to matter.

This the 11th day of June, 1974.

/s/ Joseph R. Cruciani

Bankruptcy Judge

GOLDEN ENTERPRISES, INC.

Statement of Cash Receipts and Disbursements

July 1 to July 31, 1974

Cash balance, beginning			$ 2,878.40
Cash receipts:			
7-03	Iron Gate Restaurant	$ 652.44	
7-03	CIT Financial Services	487.50	
7-05	Superior Continental	8,816.66	
7-09	Beltone	538.87	
*7-30	Joe Golden	894.11	
7-30	Travels By Golden	325.00	11,714.58
	Cash available		$ 14,592.98

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Cash disbursements:		
*7-03	North Carolina National Bank	$ 40.29
*7-03	Travels by Golden	230.91
7-05	Shelby Savings & Loan Association	2,637.09
7-05	William E. Butner	2,083.33
*7-09	Joel Reese	23.97
7-09	Fidelity Federal Savings & Loan	500.00
*7-09	Lawing, Rowe & Company, CPA's	65.35
7-09	Duke Power Company	90.69
7-18	City of Hickory	19.59
7-18	Central Telephone	6.00
7-18	Shelby Savings and Loan Association	3,426.95

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7-18	Fidelity Federal Savings & Loan	533.52	
7-25	Fidelity Federal Savings & Loan	2,533.52	
7-30	Frank Baker Insurance Agency		
	(Insur. on rental property)	582.25	$ 12,773.46
Cash balance, ending			$ 1,819.52

* Deposit of July 30, 1974 includes reimbursement of these items.

To the best of my knowledge, the information furnished above is a true and correct statement.

/s/ Joe Golden, Agent

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

ORDER ALLOWING INTERIM COMPENSATION

AND REIMBURSEMENT OF EXPENSES

THIS CAUSE coming on to be heard and being heard before the Honorable Joseph R. Cruciani, Bankruptcy Judge, upon the written application of James M. Gaither, Jr., attorney for the debtor, for an interim compensation from the estate of the debtor as a part of the costs and expenses of administration thereof, in the amount of Fifteen Thousand ($15,000.00) Dollars, or such other amount as the Court shall deem fair and reasonable, and that he be allowed and authorized reimbursement for proper costs and expenses incurred by him in this proceeding in the amount shown on the exhibits filed with his application; and it appearing to the Court that the continued administration of

this estate by James M. Gaither, Jr. will continue to require almost full-time attention to the business of the debtor's estate over an extended period of time; and it further appearing to the Court that it will work a hardship on the attorney for the debtor if he must wait for payment of compensation for his services until this proceeding is finally terminated; and it further appearing to the Court that the attorney for the debtor seeks an allowance for interim compensation in the amount of Fifteen Thousand ($15,000.00) Dollars as partial compensation for the administration of debtor's estate; and it further appearing that the attorney for the debtor has filed Applications for Fees and Expenses showing detailed statements of proper costs and expenses incurred in this proceeding by him; and it further appearing to the Court that there will be sufficient monies available from the sale of inventory and real estate of the debtor to pay the interim compensation to James M. Gaither, Jr.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that James M. Gaither, Jr., attorney for the debtor, be and he is hereby allowed the sum of $9,000.00 as interim compensation and the sum of -- for expenses advanced by him through May 28, 1974.

This the 22nd day of August, 1974.

/s/ Joseph R. Cruciani

Bankruptcy Judge

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GOLDEN ENTERPRISES, INC.

Statement of Cash Receipts and Disbursements

August 1, to August 31, 1974

Cash balance, beginning			$ 1,819.52
Cash receipts:			
8-02	Superior Continental	$ 8,816.66	
8-02	CIT Financial Services	487.50	
8-06	Beltone	538.87	
8-06	Iron Gate Restaurant	652.44	
8-06	Superior Continental	4,750.00	
8-09	U. S. Properties	1,474.20 - 2 month rent	
8-10	Casa De Bonita Beauty Salon	538.42	
	Travels By Golden	$ 325.00	$ 17,583.09
			$ 19,402.61
Cash disbursements:			
8-02	William E. Butner	$ 2,083.33	
8-02	Shelby Savings & Loan Association	2,637.09	
8-06	Fidelity Federal Savings & Loan	2,533.52	
8-06	Shelby Savings & Loan Association	8,113.27	
8-15	Central Telephone	6.00	
8-15	City of Hickory	19.59	
8-15	Duke Power Company	47.78	
8-26	Duke Power Company	83.91	$ 15,524.49
Cash balance, ending			$ 3,878.12

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To the best of my knowledge, the information furnished above is a true and correct statement.

/s/ Joe Golden, Agent

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GOLDEN ENTERPRISES, INC.

Statement of Cash Receipts and Disbursements

September 1 to September 30, 1974

Cash Balance, beginning			$ 3,878.12
Cash Receipts:			
9-03	Superior Continental	$ 8,816.66	
9-04	Beltone	538.87	
9-04	CIT Financial Services	487.50	
9-09	Superior Continental	4,750.00	
9-09	Casa De Bonita Beauty Salon	538.42	
9-12	Iron Gate Restaurant	652.44	$ 15,783.89
			$ 19,662.01

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Cash Disbursements:

9-03	Shelby Savings & Loan Association	$ 8,113.27	
9-09	Shelby Savings & Loan Association	2,637.09	
9-09	William E. Butner	2,083.33	
9-12	City of Hickory	13.66	
9-18	Duke Power Company	134.49	
9-18	Central Telephone Company	6.00	
9-18	City of Hickory	6.53	
9-18	William E. Butner	1,833.34	
9-23	Post Master	2.70	
9-26	Fidelity Federal Savings & Loan	2,533.52	
			$ 17,363.98
Cash Balance, ending			$ 2,298.08

To the best of my knowledge, the information furnished above is a true and correct statement.

/s/ Joe Golden, Agent

GOLDEN ENTERPRISES, INC.

Statement of Cash Receipts and Disbursements

October 1 to October 31, 1974

Cash Balance, beginning			$ 2,298.08
Cash Receipts:			
10-01	Butner and Gaither	$ 2,483.81	
10-03	CIT Financial Services	487.50	
10-03	Superior Continental	13,566.66	
10-03	Iron Gate Restaurant	652.44	
10-07	Casa De Bonita Beauty Salon	538.42	
10-14	Beltone	538.87	
10-17	Travels By Golden	325.00	$ 18,592.70

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Cash Disbursements:		
10-01	City of Hickory	$ 1,372.28
10-01	Catawba County	1,111.53
10-03	Hickory Post Master	5.00
10-04	Shelby Savings and Loan Association	2,637.09
10-04	Shelby Savings and Loan Association	8,113.27
10-04	Robert L. McKaughn	3,000.00
10-14	City of Hickory	20.74
10-14	Duke Power Company	103.18
10-16	Central Telephone Company	6.00

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10-25	City of Hickory	$ 16,377.09
	Cash Balance, ending	$ 4,513.69

To the best of my knowledge, the information furnished above is a true and correct statement.

Joe Golden, Agent

8.00

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

AFFIDAVIT

JAMES M. GAITHER, JR., attorney for Golden Enterprises, Inc., makes the following Affidavit regarding the condition of Golden Enterprises, Inc. and for showing cause why Golden Enterprises, Inc. should not be adjudicated a straight bankruptcy:

(1) That Golden Enterprises, Inc. filed a Petition under Chapter XI of the Bankruptcy Act on May 4, 1973.

(2) That since the filing of the Petition, the following claims have been paid in full or in part or compromised through October 31, 1974:

Willie George Costner	$ 7,425.00
Buffeteria, Ltd.	3,500.00
First-Citizens Bank and Trust Company	330,000.00

Commercial Credit Business Loans, Inc.	377,573.09
Matsushita Electric Corporation	9,000.00
Marine Midland Leasing Corporation	108,000.00*
William Grooh	10,000.00
Contractors	96,000.00
Fidelity Federal Savings and Loan Association	45,000.00**
Shelby Saving and Loan Association	95,700.00**
Shelby Savings and Loan Association	46,800.00**
First National Bank of Catawba County	18,000.00**
Second mortgage holders	30,000.00***
1973 City and County ad valorem taxes	18,000.00
1974 City and County ad valorem taxes	6,000.00
Total	$ 1,200,998.09

* $67,000.00 of this amount remains due as an unsecured debt.

** This figure includes both principal and interest.

*** This figure includes interest only.

(3) That the balances of the mortgages of Golden Enterprises, Inc. are as follows:

Fidelity Federal Savings and Loan Association	$ 174,650.56*
Shelby Savings and Loan Association	740,926.56**
Shelby Savings and Loan Association	226,123.17**
First National Bank of Catawba County	51,301.04**
Second mortgage holders	360,000.00**
Total	$ 1,553.001.33

* Balance as of September 27, 1974

** Balance as of October 31, 1974

(4) That there have been no employees of Golden Enterprises, Inc. earning salaries since early in the year 1974, and no salaries have been paid since that time. Mr. Joe Golden has acted as a non-

paid employee or agent since August 1974 for the purpose of collecting and applying rents.

(5) That no attorney fees have been paid to date except $9,000.00 which was paid to James M. Gaither, Jr. in October 1974 and $1,950.00 which was paid to James M. Gaither, Jr. in July 1974 by Shelby Savings and Loan Association for a bill incurred prior to the filing of the Petition.

(6) That the law firm of Butner and Gaither has advanced funds for debtor in possession exceeding the sum of $10,000.00 to date.

(7) That Golden Enterprises, Inc. currently has leases in force on its property producing rents as follows:

Shopping Center, Fourth Street Drive, S. W., Hickory, North Carolina

Tenant	Amount
Casa De Bonita Beauty Salon, Ltd.	$ 538.42
C.I.T. Financial Services Corporation	487.50

Fassland Enterprises, Inc.	652.44
Golden Investment Company, Inc.	325.00
United States Properties, Inc.	983.10
Benny Young and wife, Ardith Young	538.87

Tate Boulevard Property, Hickory, North Carolina

Tenant	Amount
Superior Continental Corporation (Phase I)	$ 5,540.62
Superior Continental Corporation (Phase II)	4,750.00

Warehouse on "F" Avenue, S. E., Hickory, North Carolina

Tenant	Amount
Metelpel Products, Inc.	$ 1,015.62

Warehouse on State Road No. 1653, Hickory, North Carolina

Tenant	Amount
Continental System Supply	$ 3,276.04
Total Monthly Rental Income	$ 18,107.61

(8) That Golden Enterprises, Inc. owes monthly payments as follows:

Fidelity Federal Savings and Loan Association	$ 2,533.52
Shelby Savings and Loan Association	8,113.27
Shelby Savings and Loan Association	2,637.09
First National Bank of Catawba County	1,015.62
Second mortgage holders	3,000.00
Insurance	200.00*
Utilities	150.00
Escrow for taxes	600.00
Total Monthly Payments	$ 18,249.50

* The insurance for 1975 in the amount of $2,700.00 has been paid.

(9) That under full rental conditions, there exists a negative cash flow of only $141.89 per month or $1,702.68 per year.

(10) That the following tenants with leases in force are in default in the following amounts:

Casa De Bonita Beauty Salon, Ltd.	$ 1,076.84*
United States Properties, Inc.	3,932.40**
Total Past-Due Rental Payments	$ 5,009.24

* This tenant's rent is past due for October and November 1974

** This tenant's rent is past due for August, September, October, and November 1974.

(11) That the 1974 tax bill of Golden Enterprises, Inc. for the City and County was $15,677.00; that to date the sum of $6,509.00 has been paid, leaving a balance of $9,168.00; that this figure will be further reduced by the sum of $1,116.00 when all tax bills have been paid, leaving a tax bill owing in the amount of $8,052.00.

(12) That in addition Golden Enterprises, Inc. is in arrears for the October and November payments to Fidelity Federal Savings and Loan Association in the amount of $5,067.04 less $1,309.88 for the October interest only. The total arrearage of

Golden Enterprises, Inc. through November 1974 is the sum of $11,809.16 ($8,052.00 for taxes and $3,757.16 to Fidelity Federal Savings and Loan Association). Fidelity Federal Savings and Loan Association, however, has agreed on a temporary basis to allow payments of interest only in the amount of $1,309.88 until the non-productive spaces in the shopping center are re-leased. With this agreement, the arrearage of cash flow would be the sum of $9,361.88 ($8,052.00 for taxes and $1,309.88 for November interest to Fidelity Federal Savings and Loan Association). Compare this arrearage with the money owed to Golden Enterprises, Inc. for rent from United States Properties, Inc. and Casa De Bonita Beauty Salon, Ltd.

Please note further that the 1974 tax bill contains personal property taxes in excess of $4,000.00 that will not appear on the 1975 tax statement.

Please note further that Golden Enterprises, Inc. has assets in California in storage (fixtures) that

your affiant is informed and believes will net debtor the sum of $6,000.00 following the sale. A Court-ordered sale of the fixtures is necessary, and a Motion requesting the same is in the process of being drafted. Debtor is awaiting the terms of sale as proposed by the auctioneer.

(13) In addition Golden Enterprises, Inc. has a cause of action against National Velvet Plusch, Inc., J. P. Pons and wife, and Richard Pons and wife for a breach of a Lease Agreement for undetermined damages but for at least the sum of $3,500.00.

(14) That the present economic condition of this country, especially in Catawba County, North Carolina, is not conducive to the sale of large parcels of real estate at this time.

(15) That an up-to-date appraisal of the property of Golden Enterprises, Inc. with full knowledge of the Chapter XI proceeding, of the short-term leases on the Tate Boulevard property, and the rental

vacancies at the shopping center show convincingly that there is equity for the unsecured creditors in the real estate except for the current economic condition of the country.

(16) That the debtor has actively sought to sell real estate and there is great interest, but to date debtor has received no offers to report to the Court.

(17) That the debtor needs more time to pursue the sale of parcels of its real estate at least until April 15, 1975.

(18) That the second mortgage holders are willing and required to accept less than the required interest payment for the purpose of maintaining a positive cash flow with provisions for the escrowing of taxes, insurance, and utilities.

(19) That Superior Continental Corporation has stated that a firm decision will be made on a long-term lease on the Tate Boulevard property by the end of December 1974.

(20) That the best interest of the unsecured creditors of Golden Enterprises, Inc. would be served by continuing debtor's Application for Confirmation or an Order allowing debtor additional time within which to file and gain acceptance of an amended Plan of Arrangement.

(21) That the debtor is prepared to offer the creditors a third mortgage and pledge of stock for the equity in Golden Enterprises, Inc. at whatever point and time the Creditors' Committee of Golden Enterprises, Inc. determines advisable. This would be accomplished by the execution of a note and deed of trust payable on demand on all of debtor's property to the Creditors' Committee of Golden Enterprises, Inc.

(22) That a sale of a parcel or parcels of land to obtain the sum of at least $175,000.00 for payment of taxes, administrative expenses, and attorney fees is needed to fund such an amended Plan of Arrangement.

(23) That additional time is needed in which to

consummate a sale of any or a combination of the following parcels of land:

(a) Five (5) acres of commercial property located on Tate Boulevard, Hickory, North Carolina.

(b) Building located on State Road No. 1653 in Hickory, North Carolina, presently being leased by Continental System Supply.

(c) Building located on "F" Avenue, S.E., Hickory, North Carolina, presently being leased by Metelpel Products, Inc.

(d) Shopping center, Fourth Street Drive, S. W., Hickory, North Carolina.

(24) That additional time is needed, as well as authority, to hire a rental agent for the purpose of leasing unproductive space at the shopping center owned by Golden Enterprises, Inc.

This the 4th day of December, 1974.

/s/ James M. Gaither, Jr.

(Jurat omitted in printing)

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GOLDEN ENTERPRISES, INC.

Statement of Cash Receipts and Disbursements

November 1 through November 29, 1974

Cash Balance, beginning			$ 4,513.69
Cash Receipts:			
11-01	Superior Continental	$ 8,816.66	
11-01	Superior Continental	4,750.00	
11-04	CIT Financial Services	487.50	
11-07	Travels by Golden	325.00	
11-12	Beltone	538.87	
11-18	Iron Gate Restaurant	652.44	
11-25	Casa de Bonita Beauty Salon	538.42	
11-26	Superior Continental (property taxes)	4,025.37	$ 20,134.26
			$ 24,647.95

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Cash Disbursements:

11-01	Robert L. McKaughn	$ 3,000.00
11-01	Shelby Savings & Loan Assn.	8,113.27
11-01	Shelby Savings & Loan Assn.	2,637.09
11-06	Hickory Postmaster	5.00
11-06	Fidelity Federal Savings & Loan Assn.	2,533.52
11-06	City of Hickory	16.00
11-12	City of Hickory	13.06
11-12	Duke Power Company	78.60
11-14	Frank Baker Insurance Agency	2,743.75

11-14	City of Hickory	6.53	
11-18	Tax deducted by NCNB from bank acct.	1.55	
11-20	Central Telephone Company	6.00	
11-29	City of Hickory (payment on property taxes)	2,223.96	
11-29	Catawba County (payment on property taxes)	1,801.41	$ 23,179.74
Cash Balance, ending			$ 1,468.21

To the best of my knowledge, the information furnished above is a true and correct statement.

/s/ Joe Golden, Agent

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF

NORTH CAROLINA

Charlotte Division

(Caption omitted in printing)

In Re: Hearing for Debtor to show cause why Motion for Extension of Time to Make Deposit should be granted and this case should not be converted to straight bankruptcy

APPEARANCES:

James M. Gaither, Jr., Attorney at Law
P.O. Drawer 2323; Hickory, N.C. 28601
Attorney for Golden Enterprises, Inc.

J. Carroll Abernathy
Attorney for the Creditor's Committee

Murray Tate
Attorney for First Citizens Bank

Witness: Mercer Simmons

The above entitled matter came on for hearing before the Honorable Joseph R. Cruciani, at Charlotte, North Carolina, on December 5, 1974, when the following proceedings were had, to-wit:

THE COURT: I think I will hear the second matter first. That is the hearing on why this matter should not be converted to straight bankruptcy. Mr. Gaither, as the attorney for the debtor in possession, do you wish to be heard on that?

MR. GAITHER: Yes, Sir, I do. Your Honor, I filed an affidavit with the Court that sets forth the present-- what I think-- that my affidavit of the status of the Company. I passed out copies among the people that are here representing various creditors and I also have Mr. Mercer Simmons here, who has done an appraisal of the property, Your Honor. Based on todays additions, knowing our situation with respect to unleased space and so forth and so on, and I would like for him to testify, I don't know how you want that handled. I very

much would like to either read or have that thing read or have Your Honor read it because there are a lot of facts in there that might require questions, some of these folks might have questions. I have Mr. Stan Mears, he is the Vice-President of First Citizens Bank & Trust Company and he has agreed to testify as to the economic conditions of Catawba County at the present time and that's my plan, Your Honor may proceed on that basis?

THE COURT: Before you do, let me clear up a matter that I'm most concerned about. What provision is there being made for ad valorem taxes on the property at this time?

MR. GAITHER: Your Honor, the ad valorem taxes on this property have been paid for the year 1973 and have been paid for the year 1974 with the exception of $8,000.00's worth. $4,100.00 to $4,200.00 of that amount, Your Honor, is for personal property taxes that was for inventory that Golden Enterprises had on January 1, 1974, and in 1973, approximately one-half

of that amount, $17,000.00, was paid from, if you can term it real estate money, toward those taxes.

THE COURT: Wait a minute, Mr. Gaither.

MR. GAITHER: In further answer to your question, Your Honor, with reference to the real estate taxes as stated, we owe now $8,000.00 and there is a $3,000.00 interest payment made, Your Honor, to the second mortgage holder and those gentlemen are under instructions to -- with the exception of -- they are holding a large portion of this money just until we have time to come in here and see exactly how the real estate taxes will be paid. But you see, we just started in August as a Company, so to speak, or fully rented Company for we were getting rents and applying them according to this court order and we have had August, September, October, November --you know-- and we have been operating during that time and it just takes some time to get a feel for it. We now know that the real estate taxes require approximately -- well, Mr. Simmons and

I had a disagreement about that and that document right there we said $600.00 a month and Mr. Simmons thinks it might -- it should be some more. We have net leases, Your Honor, on about half one-half the property and those taxes we have collected we sent out bills for approximately $4,500.00 and we received about $4,100.00 and anticipate receiving the other $500.00 very soon. We more or less have to make up $8,000.00 into next year and there are various ways of making it up. The best way is to sell something. As Your Honor knows, we need to sell some --

THE COURT: Right now then, you are not in compliance with the court order to maintain a separate account for taxes and to put in that account all the tax money for taxes.

MR. GAITHER: We don't have a court order that says to maintain a separate account.

THE COURT: How about your original order putting you into possession?

MR. GAITHER: Well, I am not aware of it if that is the case.

THE COURT: If you are not, you are the first one in a Chapter XI proceeding that is not.

MR. GAITHER: Well, we have these built-in charges, Your Honor, because of this order that Mr. Golden is operating under does not say to do that and pending hearings on these disbursements and on how we're going to handle this thing especially with a negative cash flow, Judge. I think we have done pretty good up to this point. We have paid just in the last, well, I would say ninety days, $6,000.and some dollars toward the taxes, and as you know, we didn't really--we weren't organized to the point that we could do that before August of this year. The total tax bill, Your Honor, for city and county for 1973-- of approximately $15,000.00 and $7,000.00 and something has been paid to date.

THE COURT: I notice you say that since the filing of the petition, you list 1973 city and county taxes of

$18,000.00.

MR. GAITHER: Yes, sir.

THE COURT: And the 1974 city and county ad valorem taxes of $6,000.00.

MR. GAITHER: Yes.

THE COURT: On January 1, you will have an additional tax bill coming due of how much?

MR. GAITHER: No, sir, we don't have that bill coming due until probably September of '75.

THE COURT: Will it be assessed as of January 1, won't it?

MR. GAITHER: It will be assessed but you see these taxes now for '74 are not due yet. They are due by January 1, however. Is that correct, Mr. Tate? Is that the way--

MR. TATE: They are due and payable without penalty until December 31. They are technically owed as of January 1, but actually we do not know what they will be until August or September.

MR. GAITHER: Yes sir, I don't think we have even received a bill, Your Honor.

THE COURT: Do you have any payroll at all now?

MR. GAITHER: No, sir, we have none.

THE COURT: Alright, go ahead, and put Mr. Simmons on the stand if you will, and we will get the information from him. the Court recognizes you as an expert in real estate.

MR. MERCER SIMMONS: Duly sworn by the Clerk.

THE COURT: Go ahead, Mr. Gaither.

EXAMINATION by Mr. Gaither:

Q. Mr. Simmons, would you describe to the Court what you have been hired to do, sir?

A. Yes, sir. I have made an appraisal based on the leases which the property is presently encumber with. And under our present economic conditions, that is the valuation as of today, I have also made a couple of projections as to what it might be by late spring or early summer of the coming year.

MR. GAITHER: Why have you chosen that date there as a comparison?

A. Well, for several reasons. One of the problems the real estate industry is facing today is the inability to finance any major transaction. There is just purely lack of the funds from the mortgage institutions and those that you do get are at a higher rate of interest. I have within the past thirty days talked to a number of savings and loan institutions, mortgage companies, banks and people of this nature and they are pretty unanimous in their opinion that well, first, they say that most of them have a cash inflow at the present time. They are using this inflow to reduce their obligations. They are not yet ready to start making loans as they have been in the past. They anticipate by spring they will be in a position to start making good loans again and, of course, this should have and normally would have a definite bearing on the price which an investor would pay for income producing profit. The second factor is

that everything that I seem to read, the people I seem to talk to, or I have talked with, all seem to be of the opinion that there will be an up-turn in the economy with the -- in the late spring and early summer and based on these comments were the reasons I used the late spring or early summer as a projection point.

Q. Would you describe the present status on the property by parcels? Are you prepared to do that?

A. How do you mean describe?

Q. Well, to describe the value of the property based on the rents received from the leases.

A. There are four properties involved. The first is on 14th Street, a warehouse facility. It is presently encumbered with a lease which is paying $39,312.00 annually. This is a net-net lease 85 cents per square foot. The probably purchaser of a property of this nature is going to finance the maximum amount that he can. And your loans that are being made will be in the range of a 75% loan -- 75% of the value. Interest rates

will probably be about 10 1/2% for property of this nature -- that is warehouse or industrial type property. Any loan will probably be for a twenty year period. Anyone investing their money in this type property is going to perform a minimum of 12% return on their equity investment of the 25% that they invest. Based on these factors, I can project that the property has a market value on today's market of approximately $360,000.00.

Q. Did you do an earlier appraisal on that same property?

A. Yes, sir, I did.

Q. Do you recall what that appraisal was?

A. No, I have it in my briefcase, if you would like me to get it.

MR. GAITHER: Yes, sir, I would.

MR. J. CARROLL ABERNETHY, JR.: Mr. Gaither, for our information, is that Universal Building?

MR. GAITHER: Yes.

THE COURT: Mr. Abernethy, as representative of

the Committee of Creditors, if you wish, you can come up and set at the Council table. I will ask you for the benefit of your advice before we can get through here.

A. I appraised this property as of March 2, 1973, and at that time I estimated it to have a value of $400,000.00.

Q. Do you have a figure there for the shopping center, the 4th Street property?

A. Yes, I do.

Q. What is that amount?

A. 250.

Q. Do you have there what it was appraised for in March of '73?

A. Yes, sir. 335,000.

Q. Now the Meadowdale property located on F Avenue, what value have you placed on that today?

A. 110,000.

Q. And what price was that in March '73?

A. 141,500.

Q. And the Tate Boulevard property?

A. Yes, sir, 893,000. Now that does not include some additional land.

Q. Yes, sir, Now there is some additional land outside that building there. Do you have an opinion as to the value of that five acres of land?

A. I didn't make a detailed study on that as of the date, but I would estimate somewhere in the realm of 12,000. I may be a little optimistic on that.

Q. 12,000.00 an acre?

A. Yes, 12,000 an acre.

Q. At $60,000.00?

A. Right, somewhere in that range.

Q. Golden Enterprises also owns three other building lots that I don't know if you are familiar with or not.

A. No, I am not.

Q. If the Tate Boulevard property that is presently leased to Superior Continental had a long term lease

for ten years using the same rates that we are using now, how would it affect your value of $893,000.00?

A. Well, if you have got a long term net -- net lease, now obviously a gross lease in this situation, but if you have a long term net -net lease at the same rental that I forecast here, then it would move this 893 up to about a million one.

Q. If the interest rates -- well, to summarize then, you have got 893/250/110/ and 360, is that correct?

A. I believe that is correct.

Q. And what does that total?

A. That totals $1,665,000.00.

Q. And you have got five acres of land at $60,000.00?

A. Right.

Q. $1,725,000.00.

A. Yes.

Q. Should the interest rates come down from the 10 1/2 per cent figure that you mentioned -- First of

all, do you anticipate them coming down?

A. Yes, they have not yet -- long term rates now, not the prime short rates, but long term rates have not yet come down, but there is an indication that they are about to do so.

Q. If they do, what effect would that have on this valuation of $1,725,000.00?

A. Well, it would increase it assuming everything else remains the same, but the interest rate. As an example if the interest rate dropped to 9 1/2 instead of 10 1/2, instead of $1,655,000.00 we would be talking about a $1,760,000.00 or approximately $100,000.00 increase. It is also possible with the availability of money that the equity requirements may come down.

A. Do you have an opinion as to what value, if it came down to say 9 1/2 per cent, what the value would be for instance in June '75?

A. Yes, somewhere around $1,760,000.00.

Q. $1,760,000.00, is that plus 60 for that land?

A. Right, that is not included in the additional land.

Q. That would be $1,820,000.00 then.

A. Right.

Q. And what figure would be added to that, were there a long term lease on the Tate Boulevard property?

A. Well, if you go back to this net lease spaces, that is approximately another $300,000.00

Q. That's all I have at this time, Your Honor, do you have any questions?

THE COURT: Do you have any questions on behalf of the Creditors Committee?

EXAMINATION by Mr. Abernethy:

Q. Mr. Simmons, I was just last night looking at Time Magazine and although I believe it said the majority of the so-called financial experts expect a slight up turn the first six months of '75, the majority was only a slightly or very small amount over fifty per cent. It is entirely possible the real estate market could con-

tinue to go down as the result of three days a week work and what not, right?

A. It is conceivable. We're projecting into the future and this is my best judgment.

Q. I understand. I have no further questions.

EXAMINATION by Mr. Gaither:

Q. Is it your best judgment that we are at the bottom and are going up?

A. Basically, I think we have bottomed-out on our interest rate and I think that the economy is going to turn up with spring. The construction activity will start up again with the availability of money and I think the economy will follow.

Q. I have no further questions, Your Honor.

EXAMINATION by Mr. Abernethy:

Q. This property is worth how much less today than it was in March of '73?

A. I didn't total those figures.

Q. I am not trying to get down to within even thou-

sand dollars.

WITNESS: Probably $300,000. - $400,000, possibility.

Q. That is all

THE COURT: Thank you, Mr. Simmons.

MR. MURRAY TATE: I am Murray Tate representing First Citizens Bank. If the Court please, may I ask a question?

EXAMINATION by Mr. Tate:

Q. Mr. Simmons, in assuming that the interest rates come down about one per cent and every time everything else stays the same you were discussing an increase in your appraisal, would that not also vary greatly on whether or not there are people looking for long term leases of this type property at that time.

A. Oh, definitely, if you have got a market at all.

Q. And really a person wishing to buy would ordinarily arrange his finances before he decided to buy.

A. Yes, sir.

Q. And the bank or any other lending institution would be very slow about loaning if a man only had a one year lease.

A. Right.

Q. So we go on to some interest rates or anything else, unless there were good long term leases available, the present market value would not likely go up?

A. Well, if there is an availability of money and if the economy is moving, and this is what I anticipate, I don't think we'll be back to a couple of years ago at this point, but we will be turned up. Now, you have two long term leases in existence, the Tate Boulevard property is one that has the short term lease.

Q. That is the one I'm particularly interested in.

A. In making my projections here, I considered the fact that there is a short term lease involved and it is a more hazardous loan or equity position either one, than with a long term lease involved.

Q. Now, Mr. Simmons, did you consider the

warehouse market in Hickory, North Carolina, other than Superior Continental. But overall, the Hickory is dependent upon the furniture industry.

A. Right.

Q. Now if there is an up-turn in the residential housing industry in the Hickory area during the spring, the furniture industry would not reach its turn around until possibility fall of 1975?

A. Yes, sir.

Q. And they will probably not need warehouse space or even production space until probably the fall market in 1975?

A. This is probably true. It's a bumping process.

Q. It takes time for it to -- I figure about a six month's lague?

A. Yes, it takes time for it to filter down.

Q. Now, did I understand, in talking about the reasonable return on equity, based upon the amount of rent that an investor would seek to get, did you use

twelve per cent of total value of the property or did you use a percentage of equity in the property?

A. It's on his equity investment. He normally would borrow the maximum amount, which under prevailing conditions, would be about seventy-five per cent. So, he would have a twenty-five per cent equity investment upon which I feel the market seems to indicate that these people are seeking a twelve per cent return on their equity investment.

A. Thank you, sir.

THE COURT: Any other questions? Thank you, Mr. Simmons.

There being no further questions, the witness was dismissed.

THE COURT: Mr. Abernethy, what would the creditors have me do?

MR. ABERNETHY: Well, now, if Your Honor please, of course Your Honor knows, I can only speak for myself, and for what it's worth -- It is probably worth

very little because frankly I think in today's economy, nobody knows. I think that there is a slight -- some of the experts say that in the next six months the economy is going to take an up turn and from what little I've read, they say that that is only slight in majority. As far as the common creditors are concerned, the unsecured creditors, If I might use the phrase. From the beginning, as Your Honor knows, it has been my opinion that if it went under as I have told clients and told other attorneys who called me from out of town, that unsecured creditors have no choice except to approve a proposed plan because if it went into a straight bankruptcy, they weren't going to get a dime. That was my opinion then, and it is my opinion today. If, If I knew what the economy is going to do in the next six months, Judge, and not being smart or facicious with the Court, I would be out trying to make some financial arrangements to take advantage of my knowledge. I don't know. And to be frank, the Court is not in an

enviable position, to be truthful with the Court, and I will try to be. If the economy takes an up-turn in the next six months, and Your Honor sees fit to hold the matter in abeyance, you might say, to see what does happen, and at the end of six to eight months the property is worth anywhere approximately the figure Mr. Simmons is using here maybe half a million dollars more you're an awful smart referee in bankruptcy. If the bottom falls out in the next ninety days, and the secured lenders take a twenty-five to fifty per cent loss, you're not -- you don't have a good track record on this case and I don't know. As I said, the Court is in an unenviable position. I will say truthfully the unsecured creditors cannot get hurt. In my humble opinion, and that is who the creditors, as I understand it, committee are to represent. The unsecured creditors, in my humble opinion, cannot get hurt to allow the matter to stay open for the simple reason that there is nothing here now and I don't think there is nothing

here when we went under. Maybe I am wrong and maybe someone else can if nobody has been able to convince me of that yet; I told Mr. Gaither that two years ago before the first hearing that the creditors committee --before the creditors committee was appointed, that there was nothing here for the unsecured creditors and I advised all my clients of that effect. I am still advising them to that.

THE COURT: Mr. Golden, how much money do you have in your account now over and above expenses of operation? What do we have accumulated in that small account?

MR. GOLDEN: You mean how much do we have in the bank right today?

THE COURT: Yes.

MR. GOLDEN: At the end of the month, I think we have about -- at the end of November, we have about $200.00, but rent is coming now for the month of December and there is a couple of clients who have not

yet paid their November rent.

THE COURT: So we are not accumulating anything? Just staying even generally in that account even with no expenses nothing being paid other than servicing the debts.

MR. GOLDEN: I would have to agree with that. We are not, in that account, accumulating money, but we are meeting our obligations.

THE COURT: Mr. Gaither, how can I assure the secured creditors that we are not just adding ad valorem taxes out there that are going to eat into their secured position?

MR. GAITHER: Well, that is a possibility, Your Honor, and the way to get around it is to sell something. We have attempted -- we have been trying to sell something.

THE COURT: Now just to sell it for taxes?

MR GAITHER: No, not for taxes, Your Honor, but it will create money. One thing that is important to

me, Your Honor, is there is a group -- there are some fixtures that are stored out in California.

THE COURT: How about answering my question first, Mr. Gaither. How am I going to assure secured creditors that we are not just going to continue to add taxes out there that might eat into their position?

MR. GAITHER: Because we have paid about $25,000.00 worth of taxes this year, Your Honor. Use and personal property taxes and real property taxes. We have paid that.

THE COURT: Out of the sale of inventory?

MR. GAITHER: No sir, we did not use any of the inventory.

THE COURT: Out of what did you pay it?

MR. GAITHER: We have paid it out of the cash flow and out of the proceeds from Shelby Savings and Loan.

MR. GOLDEN: May I say something, and I am unfamiliar with Court procedures so if I do something wrong, say something wrong, please excuse me.

THE COURT: Just state your name for the record, Mr. Golden.

MR. GOLDEN: Joe Golden, and I am not an attorney. We have some property that is not rented. If this property, which is the biggest part of the shopping center, at least fifty per cent, if we can do something with that, that will start taking down this so-called $8,000.00 deficit that we have in property taxes.

MR. GAITHER: We still, Your Honor, we can also pay $8,000.00, in view of your statement to begin with, out of the proceeds. I think taxes come before anything else anyway. I mean, we'll still have $16,000.00's worth of rent coming in this month. But, I think it is important again to point out to the Court first of all that we didn't even receive tax bills, Your Honor, until late in the summer or early in the fall and this is August and that was about three months ago and since that time, we have paid a lot of money toward taxes. We have paid all '73 taxes and we have paid $8,000.00

toward -- excuse me, $6,000.00 at present, toward '74. We did not, I guess through ignorance, for want of a better term, but we did not use the proceeds of the inventory -- there are so many claims against that money that we did not use any of that money to pay personal property taxes. There are fixtures in California, Your Honor, that there is an auctioneering firm there that I have been waiting on for almost a month to send me their qualifications. I know Your Honor's practice, you are not going to just let anybody sell them and I am waiting on something from them to prove to me that they are worthy of selling them and there is a small amount of money we can realize from that that can be applied toward these taxes to make up for the, oh probably, $15,000. taxes and taxes over the last two years that have been paid, you, know, that were personal property taxes. And we won't have those obligations anymore. Another thing --

THE COURT: Before we go to that, now Mr. Gaither,

how long have we had a confirmed plan -- not confirmed, but accepted?

MR. GAITHER: We have had an accepted plan since around November '73 and we had a company that -- National Velvet Plush, that went bankrupt or went --

THE COURT: So it became obvious that you are going to have to modify and amend plan.

MR. GAITHER: We did that, Your Honor, and we substituted the second mortgage holders. We got the money. We finished the building and we have --

THE COURT: How did you modify the plan?

MR. GAITHER: We modified it in that we substituted First Citizens or we substituted the present second mortgage holder for First Citizens Bank. We did not alter the terms.

THE COURT: Do you plan on asking for another modification of the plan?

MR. GAITHER: Yes, sir, I have. I filed a motion asking for that.

THE COURT: When was that filed?

MR. GAITHER: I filed that motion in early November and I asked for an extension of time to file the deposit, or in the alternative, an extension of time to file an amended plan. That would give us time to try and work up a sale.

THE COURT: How much time do you want to file a modified plan?

MR. GAITHER: April 15th.

THE COURT: Why do you need until April 15 to file a modified plan?

MR. GAITHER: It will get me toward that magic time that Mr. Simmons spoke of toward June. I would like to have until June, Your Honor, but I don't want to -- if we could have until June that would be better.

THE COURT: I don't even know what piece of property you plan to sell in order to provide the deposit so that you can get any plan accepted Mr. Gaither, that is where I am now.

MR. GAITHER: May I point out one other thing Judge, before I speak to that. With reference to Superior Continental, we are in the process of serious negotiations with those people Judge for a long-term lease. I have filed and would like for what I have filed to be marked as an exhibit in this thing. It is a very extensive letter to them describing the present leases and describing what we have discussed with them. I now represent to the Court that they say that they can tell me something by December 16. They earlier said they would tell me something by the end of November. Superior Continental, at one time, was a very strong company and I think they still are, but just like everybody else right now, the are having problems and they are moving slow and a ten year lease at Tate Boulevard is a $1,200,000.00 lease, Your Honor, and it is very freasible that we would get that assuming that they don't suffer severe difficulty. I hate to stop right now. There has also been filed, and I would ask that

it be marked as an exhibit on examination of the present mortgages and cash flow situation. We have certain tenants who are not -- who have gone out of business and are in arrears to us with rent. We want to rerent and have time to re-rent those spaces and that will go toward decreasing this negative cash flow situation we have right now. We have enough, Your Honor, to get by including taxes, insurance, debt service and other things if we are fully leased. And the lease to Superior Continental, if it were to come to fruition would be for a greater amount of money than it is right now because they are leasing office space from us for $1.25 a foot and they have already told us that if they lease, they will pay us $2.00 a foot and that is 6,000 feet. 75 cents a foot for a year that is a substantial increase. It gets us in a positive cash flow situation. And we are not paying any employees, we are not wasting assets, and I just don't think it should be done now.

THE COURT: You are going to have to sell some of

the real estate in order to get a deposit, aren't you?

MR. GAITHER: Yes, sir.

Q. Have you decided which piece of real estate?

A. Yes, sir, we will sell anything we have.

THE COURT: Well that still doesn't tell me anything, Mr. Gaither.

MR. GAITHER: Well, the shopping center, Your Honor. We have entered into negotiations on the shopping center before and we had an offer that fell through. Your Honor is aware of First Citizen's attempt to sell the three building lots that have not been mentioned yet. Golden Enterprises has three building lots valued at about $30,000.00 that would add to Mr. Simmon's appraisal. That fell through. All of these things started falling through when times got bad, Your Honor, but there is genuine interest. And I don't think Mr. Abernethy would deny that. I am aware that there is interest in Golden Enterprise property. I have attempted to sell the shopping center and other real estate to any

number of people. As a matter of fact, on the 21st of November, I sent out twelve to fifteen descriptions of lease agreements, description of mortgages, to twelve or fifteen people who are -- who, for the sole purpose of generating some interest in this real estate. I have received some interest, Your Honor. I can represent to the Court that Cherry, Beck & Holland, CPA firm in Hickory, has a man that works for them who has a client who is very interested. He is from New York and Mr. Bright won't tell me who he is. But he says he has been around. He has looked at the property. Mr. Bob Smoke from Bernard Furniture Industries in Lenoir has looked at the property. We are actively trying to sell the property. We have brought to the Court today a Mr. Jim Hassell, who is a noted realtor there hin Hickory, who is willing to state that what we have prepared and filed with the Court within the last few months and come back to this Court with perhaps some sort of plan concerning the sale of certain property.

I know how much we need for a deposit the profit, Your Honor, and I know what the equity is according to Mr. Simmon's testimony and it is just a matter of finding -- it is not so much finding a buyer as it is finding someone who will loan that buyer the money to make a sale at the present time and I think that given time and not wasting any assets that we can come up with a buyer and we can come up with a bank that will lend the money to the buyer, and everything else, but not at the present time. And we have worked very hard, Your Honor, since October to get the company in the shape it is right now. On January 1, 1974, Your Honor, the phast two was not finished and we didn't really have -- we didn't know what the taxes were going to be until they came out. And I think we have done darn good to -- except the mistake that was supposed to be a separate account and I state to the Court that it will be that way from this point on.

THE COURT: What do you expect ad valorem taxes

to be for next year?

MR. GAITHER: Well, I had rather Mr. Tate speak to that. I think maybe they could possibly -- they say they are going to try to hold them, but Mr. Tate is city attorney for the City of Hickory and he could probably speak to that better than I could.

THE COURT: Mr. Tate, do you know what they'll be?

mr. tate: Yes, sir. They will probably be about the same, both city and county, in talking to both city and county officials on it. We could expect it to be $15,000.00 or $16,000.00.

THE COURT: Fifteen or sixteen?

MR. GAITHER: The real estate taxes for 1974, Your Honor, are $11,000.00 and of that amount, $4,500.00 are in the form of net-net leases that we get from tenants. So forty-five from eleven is what we have to come up with. Now, if we can see this long term lease to with the document that has been filed with this Court. In

the letter to Superior Continental, it talks about a net-net lease where they pay taxes and I think we can get that, but I don't know. I can't guarantee it but that would decrease the amount that we would have to reserve even that much more.

THE COURT: Mr. Tate, you represent a secured creditor. What would you have the Court do?

MR. TATE: If the Court please, it looks like very little difference to my particular time. We have these three lots -- three vacant lots and there is no way in the world that they will come at any time anywhere near paying our entire amount of money. We are talking about $30,000.00's worth of real estate and our debt is 150-170 some thousand dollars. I don't know what.

THE COURT: It sounds like you seem to be an unsecured creditors.

A. Well, we are probably the largest unsecured creditor.

THE COURT: So you hope to get a plan of arrangement then where there will be a percentage pay out.

MR. TATE: If we could see something that we could have some hopes in. We really thought that the shopping center would be sold a while back and I understand that we did have an offer but Mr. Golden was not in favor or someone was not in favor of going through. I believe that offer, that was a firm offer, has now been withdrawn or reduced. I don't know but what we're going backwards. As I understand it, there are some difficulties with the payment of the rental on the shopping center leases and this is a problem too. The figures on net -- on cash flow will be even worse if these people stop paying their rent. And I don't know, in Mr. Gaither's statement, United States Properties have ceased business operations and one of the other tenants is behind in their rental. Well, this also causes us great concern. Of course, we feel it is a great mistake not to sell when we had an offer before

and perhaps if there is a firm offer on that now that would give us a lot more of an idea. I think that property is much more salable than the warehouse property at this time and I may be wrong. I don't claim to be any expert but I do have some warehouse property and I do have some commercial property and residential property, and certainly commercial property now has a better sales value in Hickory than the other two. The other two are non-existant.

THE COURT: What do you think about an April 20 or April 15th date in which to file a modified plan. Do you think that is enough of a fixed period to sort of give them a chance and if it doesn't -- if we don't get a modified plan that will be accepted by that time to then proceed to straight bankruptcy?

MR. TATE: Well, if the Court please, I am not speaking for a client, but just individually. This is not my client's position in particular. I really don't feel that there is anything that I read, and I try to read a lot,

I don't know much about economics, but I don't see that the general economy of the Hickory area is going to make any difference in April from what it is now. I think that if there is going to be any change we won't see it until after the fall market. That's with twenty-five years experiences following that. I feel a shorter time would be just as good as waiting until April a shorter time for a modified plan to be brought with an extreme emergency in trying to put the shopping center, at this time, and not pussy - foot around if they get an offer.

MR. GAITHER: Your Honor, we haven't pussy-footed around on this.

MR. TATE: No, sir, I don't believe you have, but I think when we had an offer that --

MR. GAITHER: The offer was tied to the acceptance of a plan.

MR. TATE: The offer was 325, was it not?

MR. GAITHER: 330, but it was tied to an acceptance

of a plan, and in order to get an acceptance of the plan -- at that time we had we were still negotiating with Superior and they were hand in hand and it sort of failed offon us and we were just left -- we weren't even sure of our ability -- of our right to sell strictly to make -- to create money without -- we have the power to sell, but we weren't sure what effect that would have on whether we had the actual right. That to me is almost in a sense wasting assets without the proper foundation and everything and we run into some problems on that basis. Let me say this, Your Honor, and I won't say anything else. But Mr. Golden has gone a long way in this thing. He has come from a point where he was going to pay creditors off in ten years and he was going to be left with a company that was going to be worth a lot of money to the point that he does not want anything, Judge, he would like to have something when it is all over, but he doesn't expect to get anything. All he wants to do is to make an

honest attempt to pay his creditors and if he gets nothing, that is fine. At least he will have done a plan of arrangement and done the best he could. We got these negotiations going and they are good faith negotiations with Superior Continental. We have got negotiations going with at least twelve other people to sell the property. We have Mr. Hassell back here who is willing to help us. We need to get that property rented over there and it is just sort of pulling the rug out from under us at the present point. We are willing to be called on our mistakes, Your Honor, especially with respect to these taxes and we will get that straight, but we don't want to stop now.

THE COURT: I am going to go ahead and give you till March 31st. I'd say April 1st, but that's April Fool's Day. So I am going to give you until March 31st to file a modified plan. Get realistic in that plan so that you keep the money that you deposit -- that you need as low as possible, so you can sell as little real estate as

possible and yet give something to unsecured creditors. March 31st for filing of the plan and April 23, 1975, for hearing -- that is to count the acceptances or rejections. There will be a fixed date beyond that at which you will come up with a deposit.

MR. ABERNETHY: Your Honor, please, I may make one more observation. To be truthful with the Court, I think depending on Superior Continental at this stage is like building a castle beside the sea. Superior Continental is wanting to get out of Hickory. They are not wanting to come in. I want to be truthful and frank with the Court. And truthfully again, it's going to be very difficult to sell anything in Hickory for a whole lot of money at this time over and above what's owed on it, simply because everybody else is just exactly like I am, if I had a couple hundred thousand dollars, I wouldn't buy nothing today. I wouldn't buy a dime's worth of anything until I was positive it had reached rock bottom and was fixing to rebound and

on Golden's I wouldn't buy five cents worth because I would be sitting and hoping that it would go into a straight bankruptcy, and I could go to the secured creditors and say I'll set up a corporation and I'll pay $5,000.00 over and above what your loan is if you'll stand on the loan. Now that is what they are facing. Now, if they come up with a cash offer between now and April 15, they are Houdini, and I wish them luck.

THE COURT: Mr. Tate, as one of the secured creditors, a little bit of a secured credit and any unsecured creditors, if the rental situation out there should get bad I expect on your own notion, Mr. Gaither, or one of the secured creditors to bring this matter on for determination prior to that time because I see that if the rental situation gets real bad out there, it is liable to upset our hopes that they can come up with a modified plan. So, even though we have continued this matter for a modified plan to be filed on a certain date it does not prevent bringing it on for an earlier deter-

mination that we've got to go ahead with straight bankruptcy. Alright, Mr. Gaither.

MR. TATE: If the Court please, in regard to the real estate which is securing to the extent that it is secured, First Citizens Bank property, would it be in order if we secured a purchaser for that property to petition the Court and should that be an adverse petition, if we ask the Court for permission to sell or have that sold to apply on the amount owed us?

THE COURT: That is non-income producing property, isn't it?

A. Yes, sir.

THE COURT: That would be in order to make that petition.

MR. GAITHER: May I say something, Your Honor. We have received permission from the Court to sell that same property at an earlier date, but would it be necessary to get another order?

THE COURT: If you get an offer and approval

and confirmation of the Court.

MR. TATE: Our purchaser just backed out.

MR. GAITHER: If that Order is still valid, we could just come in for confirmation.

THE COURT: It is still valid. I have never revoked it. Before Mr. Abernethy leaves before we do leave this proceeding, in all that I have said, I don't want to play down the job that you have done so far, Mr. Gaither, out there. He is not Houdini, but to get from where you are to where you are, from where you were to where you are, was quite a task and I hope that you are successful in filing a modified plan and getting it accepted and finding a purchaser for some of this so that some of it can be saved for Golden Enterprises.

MR. GAITHER: Thank you, Judge. To be honest, Your Honor, Mr. Simmons came up with those prices. They haven't been offered in writing, but they have been discussed and have been turned down because

we felt like they were too low and now knowing what we know, I think we can get that amount of money.

MR. ABERNETHY: If your Honor please, I didn't mean-- I am certain the Court didn't take it that way, to say that I was saying anything against Mr. Gaither's efforts. I mean I was just trying to state the thing as I saw it.

THERE BEING NOTHING FURTHER, THE ABOVE MATTER WAS CONCLUDED.

CERTIFICATE

I, Paulette H. Blackwelder Harris, official Court Reporter for the United States District Court for the Western Distr'ct of North Carolina, do hereby certify the foregoing 33 pages to be a true, complete, and accurate transcript of the testimony and proceedings in the above entitled matter, as reported by me.

This the 3rd day of February, 1975.

/s/ Paulette H. Blackwelder Harris

Paulette H. Blackwelder Harris

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

ORDER

Upon the annexed application of James M. Gaither, Jr., attorney for Golden Enterprises, Inc., the above-named debtor, filed on the 30th day of December, 1974, for approval to disburse the sum of One Thousand Four Hundred Seventy-Three and 76/100 ($1,473.76) Dollars from the Golden Enterprises, Inc. Disbursement Account and to apply said sum on the 1974 City of Hickory and Catawba County ad valorem taxes in the amount of approximately Eight Thousand Fifty-Two ($8,052.00) Dollars now being due; and it appearing that no notice of a hearing thereon should be given, and for good cause appearing to me therefor, it is

ORDERED that James M. Gaither, Jr., be, and he hereby is, authorized to disburse the sum of One

Thousand Four Hundred Seventy-Three and 76/100 ($1,473.76) Dollars from the Golden Enterprises, Inc. Disbursement Account and to apply said sum on the 1974 City of Hickory and Catawba County ad valorem taxes in the amount of approximately Eight Thousand Fifty-Two ($8,052.00) Dollars.

This the ____ day of December, 1974

/s/ Joseph R. Cruciani, Bankruptcy Judge

Denied 12-30-74

GOLDEN ENTERPRISES, INC.

Statement of Cash Receipts and Disbursements

December 1 through December 31, 1974

Cash Balance, beginning			$ 1,468.21
Cash Receipts:			
12-03	Iron Gate Restaurant	$ 652.44	
12-03	CIT Financial Services	487.50	
12-05	Travels By Golden	325.00	
12-06	Superior Continental	13,566.66	
12-06	Beltone	538.87	
12-16	Casa De Bonita Beauty Salon	538.42	
12-17	Iron Gate Restaurant (Payment on Taxes)	586.08	
12-31	Travels By Golden	325.00	
			$ 17,019.97
			$ 18,488.18
Cash Disbursements:			
12-09	City of Hickory	$ 16.00	
12-10	Duke Power Company	165.68	
12-16	City of Hickory	19.59	
12-16	Central Telephone Company	6.00	
12-17	Hickory Postmaster	2.70	
12-19	Shelby Savings & Loan Association	2,637.09	
12-19	Shelby Savings & Loan Association	8,113.27	
12-19	Fidelity Federal Savings & Loan Assn.	2,533.52	

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12-19	City of Hickory			
	(Payment on property taxes)	2,000.00		
12-19	Catawba County			
	(Payment on property taxes)	2,000.00	$	17,493.85
Cash Balance, ending			$	994.33

To the best of my knowledge, the information furnished above is a true and correct statement.

/s/ Joe Golden, Agent

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GOLDEN ENTERPRISES, INC.

Statement Of Cash Receipts And Disbursements

January 1 through January 31, 1975

Cash Balance, beginning				994.33
Cash Receipts:				
1-02	Superior Continental	$ 13,566.66		
1-02	C.I.T. Financial Services	487.50		
1-09	Iron Gate Restaurant	652.44		
1-10	Beltone	538.87		
1-16	Casa De Bonita Beauty Salon	538.42	$	15,783.89
			$	16,778.22

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Cash Disbursements:

1-02	Hickory Postmaster	$ 5.00	
1-09	City Of Hickory	16.00	
1-09	Duke Power Company	187.84	
1-09	Fidelity Federal Savings And Loan	2,533.52	
1-09	Shelby Savings & Loan Association	8,113.27	
1-09	Shelby Savings & Loan Association	2,637.09	
1-10	Catawba County		
	(Payment of Property Taxes)	2,167.62	
1-13	City of Hickory	19.59	
1-20	Frank Baker Insurance Agency	43.00	
1-20	Central Telephone Company	6.00	$ 15,728.93

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Cash Balance, ending $ 1,049.29

To the best of my knowledge, the information furnished above is a true and correct statement.

Joe Golden, Agent

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IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

ADJUDICATION ORDER

At Charlotte, North Carolina, in said district on the 14th day of February, 1975.

A hearing pursuant to Rule 11-20(d) of the Bankruptcy Act having been held by the Court on the 22nd day of January, 1975, upon notice to the debtor and other parties in interest and an order having been entered for the debtor to file an indemnity bond in the amount of Fifty Thousand ($50,000) Dollars on or before February 5, 1975;

And it further appearing to the Court that the debtor has failed to file the indemnity bond timely and that no extension of time has been requested or granted;

And it further appearing that notice of a hearing, pursuant to Rule 11-42(b)(2) of the Act, was timely

given to debtor and other interested parties;

And the Court, after hearing the attorney for the debtor and other interested parties, finds as a fact that debtor failed to timely file the required indemnity bond;

And the Court further finds as a fact that it is in the best interest of the estate to adjudicate the debtor a bankrupt.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED, pursuant to Rule 11-42(b)(2) of the Bankruptcy Act, that bankruptcy be proceeded with according to the provisions of said Act.

This the 14th day of February, 1975.

/s/ Joseph R. Cruciani

Bankruptcy Judge

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

ORDER APPOINTING TRUSTEE AND AUTHORIZING OPERATION OF BUSINESS AND MANAGEMENT OF PROPERTY

THIS CAUSE coming on to be heard upon order of this Court dated February 10, 1975, upon the failure of the Debtor to file an indemnity bond, and after due consideration it appears to the Court as follows:

1. That Debtor filed a Petition for an Arrangement pursuant to Chapter XI of the Bankruptcy Act on May 4, 1973, and that no plan has been confirmed or approved as of this date, and that the Debtor should be adjudged to be a bankrupt;

2. That Joe N. Cagle was appointed standby Trustee of the Estate of the above-named Debtor, on June 27, 1973, and that the said Joe N. Cagle accepted such

appointment.

NOW, THEREFORE, for sufficient cause shown, it is

ORDERED that the above-named Debtor is adjudged to be a bankrupt; and it is further

ORDERED, that Joe N. Cagle, be and he hereby is, appointed Trustee of the property of Golden Enterprises, Inc., the above-named Debtor; and it is further

ORDERED that within five (5) days after the entry of this order, the said Joe N. Cagle shall qualify as said Trustee by entering into bond to the United States in the sum of $50,000.00, with such sureties as shall be approved by this Court, conditioned for the faithful performance of his official duties; and it is further

ORDERED that upon his qualification said Trustee shall have and may exercise, to the extent consistent with Chapter XII of the Bankruptcy Act, such additional rights and powers as a receiver in equity would have if appointed by a Court of the United States for the property of said Debtor; and it is further

ORDERED that during such operation and management, said Trustee shall file in duplicate with the Clerk of this Court, not later than the 20th day of each month, a report and summary of the operations of the business and the management of the property during the preceding month, which report shall include a classified statement of receipts and disbursements, indebtedness incurred, credit extended, contractual and other obligations assumed; and it is further

ORDERED that without in any way limiting the generality of the foregoing, said Trustee shall have full power and authority until the further order of this Court (a) to employ, discharge and fix the compensation, salaries, and wages of all managers, agents, employees and servants as he may deem necessary and advisable for the proper operation of the business and the management, preservation and protection of the property of said Debtor, (b) to pay and satisfy out of any funds now or hereafter coming into his possession

all claims for wages, salaries and compensation of all managers, agents, employees and servants for services hereafter rendered, (c) to buy and sell merchandise, supplies and other property, and to render services, for cash or on credit, (d) to purchase or otherwise acquire for cash or on credit, such materials, equipment, machinery, supplies, services or other property, as he may deem necessary and advisable in connection with the operation of said business and the management and preservation of said property, and to pay for any such purchases made on credit when due, (e) to enter into any contracts incidental to the normal and usual operation of said business and the management and preservation of said property, (f) to keep the property of the within estate insured in such manner and to such extent as he may deem necessary and advisable, (g) to collect and receive all rents, issues, income and profits, and all outstanding accounts, things in action and credits due or to become due to

the within estate, and to hold and retain all moneys thus received to the end that the same may be applied under this or different or further orders of this Court, and (h) to pay and discharge out of any funds now or hereafter coming into his hands, all taxes and similar charges lawfully incurred in the operation of said business and the preservation and maintenance of said property since the filing of said Petition; and it is further

ORDERED that said Trustee shall close the present books of account, as of the close of business on the date of the entry of this order, and shall open new books of account, as of the opening of business on the next succeeding business day, in which new books of account he shall cause to be kept proper accounts of his earnings, expenses, receipts, disbursements and all obligations incurred and transactions had in the operation of the business and the management, preservation and protection of the property of the

within estate; and said Trustee shall preserve proper vouchers for all payments made on account of such disbursements; and it is further

ORDERED that the Trustee is hereby directed and required to segregate and hold separate and apart from all other funds all moneys withheld from employees or collected from others for taxes under any law of the United States or of any State or subdivision thereof, and to deposit the moneys so withheld or collected in a separate bank account not later than within the calendar week next after such collecting or withholding, and the Trustee shall retain such funds in such separate bank account pending further order of this Court, except that the Trustee is hereby authorized to pay from said bank account to the appropriate authorities the appropriate amounts at the times and in the manner prescribed by law; and it is further

ORDERED that at the time of making each deposit of money in a separate bank account pursuant to this

order, the Trustee shall notify the proper Director of Internal Revenue, for the attention of the Legal Section, of the date and place of deposit and the amount of money deposited with respect to each item of Federal Tax, upon the form furnished by the Director of Internal Revenue.

Dated at Charlotte, North Carolina, this the 14th day of February, 1975.

/s/ Joseph R. Cruciani

U. S. Bankruptcy Judge

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

MONTHLY FINANCIAL REPORT

The undersigned Trustee submits the following report of receipts and disbursements in the month of February, 1975, since the date of his qualification as Trustee:

Checking Account Balance		$ 1,049.79
Rental Income Receipts:		
Superior Continental	$ 3,276.04	
Superior Continental	5,540.62	
C.I.T. Financial		
Services	487.50	
Iron Gate Restaurant	652.44	
Beltone	538.87	15,245.47
	Total Cash	$16,295.26

Cash Disbursements:

Fidelity Federal Savings & Loan	$2,533.52	
Shelby Savings & Loan Assn.	2,637.09	
Shelby Savings & Loan Assn.	8,113.27	
City of Hickory	16.00	
Central Telephone Co.	6.00	
City of Hickory	6.53	
City of Hickory	6.53	
Duke Power Co.	107.70	
Duke Power Co.	94.22	$13,520.86
Balance in Checking Account		$ 2,774.40

Footnote #1: The mortgage to Fidelity Federal Savings & Loan Association is still two months in arrears, even after having made the monthly payment as indicated above. This is the first mortgage that is on the Shopping Center.

Footnote #2: U. S. Properties and Casa de Bonita Beauty Salon are two tenants who have defaulted and moved out of the Shopping Center. My investigation reveals thus far that collection prospects are doubtful.

Footnote #3: Travels By Golden is another tenant in the Shopping Center. It has not paid its monthly rent for January and February, 1975. The undersigned Trustee has demanded payment from this tenant.

Footnote #4: The Trustee has opened a checking account for this bankrupt estate at North Carolina National Bank, Hickory, North Carolina.

This is to certify that the above represents a true and accurate record of the receipts and disbursements of the undersigned Trustee during the month of February, 1975, in the above-referenced estate.

/s/ Joe N. Cagle, Trustee

P. O. Box 2050

Hickory, NC 28601

COUNSEL:

Joe N. Cagle, Attorney

CAGLE AND HOUCK

P. O. Box 2050

Hickory, NC 28601

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

AMENDED MONTHLY FINANCIAL REPORT

February, 1975

349a

The undersigned Trustee submits the following report of receipts and disbursements in the month of February, 1975, since the date of his qualification as Trustee:

Checking Account Balance		$ 1,049.79
Rental Income Receipts:		
Superior Continental	$ 3,276.04	
Superior Continental	5,540.62	
Superior Continental	$ 4,750.00	
C.I.T. Financial Services	487.50	
Iron Gate Restaurant	652.44	
Beltone	538.87	
Travels by Golden	650.00	15,895.47
	Total Cash	$16,945.26

350a

Cash Disbursements:

City of Hickory-Utility bill under lease		16.00
Central Telephone Co.	"	6.00
City of Hickory	"	6.53
City of Hickory	"	6.53
Duke Power Co.	"	107.70

Duke Power Co.	"	94.22	
Shelia Rawls-Work re notice to creditors		19.50	
Instant Copies	"	28.84	
North Carolina National Bank-Checks		6.00	291.32
	Balance in Checking Account		$16,653.94

This is to certify that the above represents a true and accurate record of the receipts and disbursements of the undersigned Trustee during the month of February, 1975, in the above-referenced estate.

/s/ Joe N. Cagle, Trustee

P. O. Box 2050

Hickory, NC 28601

COUNSEL:

Joe N. Cagle, Attorney

CAGLE AND HOUCK

P. O. Box 2050

Hickory, NC 28601

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

(Caption omitted in printing)

ORDER FOR FIRST MEETING OF CREDITORS

AND FIXING TIMES FOR FILING OBJECTIONS

TO DISCHARGE AND FOR FILING COMPLAINT

TO DETERMINE DISCHARGEABILITY OF CERTAIN

DEBTS, COMBINED WITH NOTICE THEREOF AND

OF AUTOMATIC STAY

AFTER CONVERSION FROM CHAPTER XI ON

FEBRUARY 14, 1975

To the bankrupt, his creditors, and other parties in interest:

Golden Enterprises, Inc. of **1234 S. Center St., Hickory, NC 28601, having filed a petition under Chapter XI on May 4, 1973, and having been adjudged a bankrupt on February 14, 1975, for failure to post indemnity bond as ordered, it is ordered, and notice is hereby given, that:

1. The first meeting of creditors shall be held at Main Post Office Building, Second Floor, Statesville, North Carolina, on April 16, 1975, at 2:00 o'clock p.m.

2. The bankrupt shall appear in person [or, if the bankrupt is a partnership, by a general partner, or, if the bankrupt is a corporation, by its president or other executive officer] before the court at that time and place for the purpose of being examined.

3. June 16, 1975 is fixed as the last day for the filing of objections to the discharge of the bankrupt.

4. June 16, 1975 is fixed as the last day for the filing of a complaint to determine the dischargeability of any debt pursuant to § 17c(2) of the Bankruptcy Act.

You are further notified that:

The meeting may be continued or adjourned from time to time by order made in open court, without further written notice to creditors.

At the meeting the creditors may file their claims, elect a committee of creditors, examine the bankrupt

as permitted by the court, and transact such other business as may properly come before the meeting. Joe Cagle, Esq., P. O. Box 2050, Hickory, NC, was elected trustee.

As a result of this bankruptcy, certain acts and proceedings against the bankrupt and his property are stayed as provided in Bankruptcy Rules 401 and 601.

If no objection to the discharge of the bankrupt is filed on or before the last day fixed therefor as stated in subparagraph 3 above, the bankrupt will be granted his discharge. If no complaint to determine the dischargeability of a debt under clause (2), (4), or (8) of §17a of the Bankruptcy Act is filed within the time fixed therefor as stated in subparagraph 4 above, the debt may be discharged.

In order to have his claim allowed so that he may share in any distribution from the estate, a creditor must file a claim, whether or not he is included in the list of creditors filed by the bankrupt. Claims which

are not filed within 6 months after the above date set for the first meeting of creditors will not be allowed, except as otherwise provided by law. A claim may be filed in the office of the undersigned bankruptcy judge on an official form prescribed for a proof of claim.

Unless the court extends the time, any objection to the report of exempt property must be filed within 15 days after the report has been filed.

Dated: February 24, 1975

Joseph R. Cruciani

Bankruptcy Judge

P. O. Box 1109

Charlotte NC 28231

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

STATEMENT OF ASSETS

JAMES M. GAITHER, JR., attorney for Golden Enterprises, Inc., hereby files a statement of assets pursuant to Rule 122 of the Bankruptcy Act.

1. Cash - $1,473.76

This cash represents the balance held in Golden Enterprises, Inc., Disbursement Account, James M. Gaither, Jr., Disbursing Agent, from the sale of inventory of Golden Enterprises, Inc.

2. Miscellaneous personal property - Approximate

(a) Seven (7) filing cabinets containing Golden Enterprises, Inc.'s records located at former office, now Travel World, at Golden Enterprises Shopping Center, Fourth Street, S. W. Hickory, North Carolina.

(b) Miscellaneous fixtures stored at Bekins Moving & Storage Co., 6200 Lankershim, North Hollywood, California. These fixtures have an approximate value of $16,000. Bekins claims rent due in the sum of $6,006.74. Inventory sheet will be forwarded to attach to this statement of assets when received.

3. Real Estate owned by Golden Enterprises, Inc. and Leases of Golden Enterprises, Inc. as they apply to particular portions of real estate

A. Warehouse and office located at 1516 F Avenue, S. E., Hickory, North Carolina (known as Metelpel Products Building).

Square feet - 16,250

See Book 927 at page 208, Catawba County Registry

MAI appraised value (12/5/74) - $110,000

Leased to Metelpel Products, Inc., a division of

Superior Continental Corporation

Term - 3/24/70 to 3/23/85

Annual rental - $12,187.50

Mortgages:

(1) First National Bank of Catawba County in the original amount of $74,000, current balance - approximately $48,000.

(2) Two deeds of trust to William E. Butner, Robert L. McKaughn, Jr., and Jack Sipe Construction Co., Inc. (hereinafter called BSM Mortgage) in the original sum of $360,000, current balance - $360,000.

B. Golden Enterprises Shopping Center, Fourth Street Drive, S. W., Hickory, North Carolina.

Square feet - 9,054

MAI appraised value (12/5/74) - $250,000

Mortgages:

(1) Deed of trust to Fidelity Federal Savings & Loan Assn. Original amount - $200,000, current balance - $174,000

(2) Second deed of trust to BSM Mortgage

Leases:

(a) CIT Financial Services, Inc.

Square feet - 1,500

Term - 6/1/72 - 5/31/77

Rent - $437.50 per month

(b) Fassland Enterprises, Inc.

Square feet - 2,409

Term - 5 year lease

Rent - $652.44 per month

(c) Golden Investment Company, Inc.

Square feet - 868

Term - 5 year lease

Rent - $325.00 per month

(d) Benny Young and Ardith Young

Term - 6/1/73 to 5/31/78

Rent - $538.87 per month

(e) Vacant

Square feet - 1,848

(f) Vacant

Square feet - 2,840

C. Continental Systems Supply Building, 231 9th Street Lane, S. E., Hickory, North Carolina.

Square feet - 46,000

MAI appraised value (12/5/74) - $360,000

Mortgages:

(1) Shelby Savings & Loan Association

Original amount - $260,000, current balance - $225,000

(2) Second deed of trust to BSM Mortgage

Leases:

(a) Continental Systems Supply, a division of Superior Continental Corporation

Term - 15 years (1971 - 1986)

Rent - $39,100 per year

D. Tate Boulevard Property, 1120 Tate Boulevard, Hickory, North Carolina. (See Book 990 at page 629, Catawba County Registry.)

16 acres

Phase I - 53,190 square feet

Phase II - 45,600 square feet

MAI appraised value (12/5/74):

Phase I & II	$ 893,000
Additional land	50,000
	$ 943,000

Mortgages:

(1) Deed of trust to Shelby Savings and Loan Assn.

Original amount - $755,000, current balance - $741,000

(2) Second deed of trust to BSM Mortgage

Leases:

Phase I to Superior Continental Corporation

Term - 1/1/74 to 12/31/76, 2 year option

Phase II to Superior Continental Corporation

Term - 8/1/74 to 8/1/75

Rent - $1.25 per square foot

Phase II to Butner, McKaughn, and Sipe

Term - 8/1/75 to 7/31/77

Rent - $.60 per square foot

E. Tract of land on 9th Street, S. W., Hickory, North Carolina.

See Book 940 at page 365, Catawba County Registry

Value - $10,000

Mortgages:

(1) Deed of trust to First Citizens Bank & Trust Company

(2) Second deed of trust to BSM Mortgage

F. Two residential lots located on 5th Street Circle, N. W., Hickory, North Carolina.

See Book 988 at page 595, Catawba County Registry

(Plat Book 13 at page 39) as to Lot 2

See Book 990 at page 39, Catawba County Registry

(Plat Book 13 at page 39) as to Lot 1

Value - Lot 1 - $10,000

Lot 2 - $10,000

Mortgages:

(1) Deed of trust to First Citizens Bank & Trust Company

(2) Second deed of trust to BSM Mortgage

Copies of all leases are in the possession of James M. Gaither, Jr., attorney for Golden Enterprises, Inc., Post Office Box 1650, Hickory, North Carolina.

4. Stocks and Bonds

There were no stocks and bonds owned by Golden Enterprises, Inc. as of adjudication date February 14, 1975. See copy of letter from First Citizens Bank & Trust Company attached hereto.

5. Lawsuits

Golden Enterprises, Inc. has a cause of action against the following companies for breach of lease agreements:

(1) National Velvet Plusch, Inc. - breach of 10 year lease

(2) U.S. Properties, Inc. - breach of 5 year lease

(3) National Cash Register - possible breach of warranty of fitness for particular purpose by NCR on equipment leased from Marine Midland Bank.

Mr. Joe N. Cagle, Trustee in Bankruptcy, has been advised of the breaches.

This the 24th day of March, 1975.

James M. Gaither, Jr., Attorney for

Golden Enterprises, Inc.

(Verification omitted in printing)

(Jurat omitted in printing)

FIRST-CITIZENS BANK & TRUST COMPANY

Hickory, North Carolina 28601

March 13, 1975

Jimmy Gaither

Attorney at Law

P. O. Box 1650

Hickory, North Carolina 28601

Dear Jimmy:

In response to your letter of February 25, 1975, we have not had any stocks in the name of Golden Enterprises securing a loan. Over the many months that the Golden matter has been in litigation, we have sold stocks in the name of Tommy or Jane Golden which was used as collateral on a loan in the name of Tommy Golden. In each of these instances, when the stock was sold, Mr. Golden was advised as to the price and the proceeds were applied to the loan in his name. We have recently, at the request of Mr. Golden, contacted the members of his family and Jane's family concerning two

issues of stock, Shuford Mills and Hickory Manufacturing Company, Inc., in order that they may have first choice to buy this stock. The Shuford Mills stock was sold to a member of Mr. Golden's family and the Hickory Manufacturing stock was sold on the open market.

Also securing this loan in the name of Tommy Golden was a deed of trust executed the 31st day of January, 1972, which was recorded the 1st day of February, 1972, at 4:00 p.m. in Book 989, Page 534 and was in the amount of $150,000.00. We are still holding this deed of trust as collateral on Tommy Golden's loan.

If I can be of further assistance to you concerning this matter, please do not hesitate to call me.

Sincerely,

/s/ B. John Peele

Vice President

cc: Joe Cagle

Murray Tate

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

MONTHLY FINANCIAL REPORT

March, 1975

The undersigned Trustee submits the following report of receipts and disbursements in the month of March, 1975:

Checking Account Balance		$ 16,653.94
Rental Income Receipts:		
Superior Continental	$ 3,276.04	
Superior Continental	5,540.62	

Superior Continental		4,750.00	
C.I.T. Financial Services		487.50	
Iron Gate Restaurant		652.44	
City of Hickory - Refund		6.73	14,713.33
		Total Cash	$ 31,367.27

Cash Disbursements:

City of Hickory-Utility bill under lease		$ 16.00	
Central Telephone Co.	"	6.00	
City of Hickory	"	6.53	
City of Hickory	"	6.53	
Duke Power Co.	"	103.02	
Duke Power Co.	"	87.11	
Advanced Court Reporters - Reporting hearings		95.00	320.19
		Balance in Checking Account	$ 31,047.08

*Rental payments for the month of March have not been received from Travels by Golden and Beltone.

This is to certify that the above represents a true and accurate record of the receipts and disbursements of the undersigned Trustee during the month of March, 1975, in the above-referenced estate.

/s/ Joe N. Cagle, Trustee

P. O. Box 2050

Hickory, NC 28601

COUNSEL:

Joe N. Cagle, Attorney

CAGLE AND HOUCK

P. O. Box 2050

Hickory, NC 28601

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF N. C.

Charlotte Division

(Caption omitted in printing)

TRANSCRIPT OF FIRST MEETING OF CREDITORS

AFTER CONVERSION FROM CHAPTER XI

APPEARANCES:

Joe N. Cagle, Attorney at Law, P.O. Box 2050, Hickory,

N.C. 28601

Trustee for Golden Enterprises, Inc.

Mr. James M. Gaither, Jr., Attorney at Law, Hickory,

N.C.

Attorney for Golden Enterprises, Inc.

C.B. Cash, Jr., Attorney at Law, Shelby, N.C.

Attorney for Shelby Savings & Loan Association

Mr. W.E. Butner, Attorney at Law, Hickory, N.C.

Representing himself and Mr. McKaughn

William R. Sigmon, Attorney at Law, Hickory, N.C.
Attorney for Fidelity Federal Savings & Loan Association and First National Bank of Catawba County

Wayne Huckel, Attorney at Law, Charlotte, N.C.
Appearing on behalf of Edgar Love, Attorney for Marine Midland

W. George Huffman, Attorney at Law, Hickory, N.C.
Attorney for Jack Sipe Construction Company

Wallace Dixon, Attorney at Law, Statesville, N.C.
Appearing on behalf of T.C. Homesley, Jr., Attorney for Top Brands, Inc.

This matter came on for hearing before the Honorable Joseph R. Cruciani, at Statesville, North Carolina, on April 16, 1975, when the following proceedings were had, to-wit:

THE COURT: This is a converted proceeding. Mr. Cagle, would you give the creditors and the Court a report of what has transpired on this since the conversion.

MR. CAGLE: May it please the Court, since filing of the Trustee's bond, I have been collecting the rents and making the nominal utility bill payments from the rental income as required under the leases. I filed with the Court an inventory and a Statement of Assumed Contracts which, in effect, are the existing leases. I have been able to lease one of the office spaces in the Golden Shopping Center or office complex, whichever you prefer to call it, so that there are now five spaces rented in the shopping center. And, I have with me today, a petition asking the Court to review my petition for permission to lease another space in the shopping center to an insurance agency, Freelon Broome Insurance Agency in Hickory, but it is for only a one year term, but it is at a rate of four and a half per square foot which is a favorable rate, competitive from the landlord's standpoint. We have had many discussions with many creditors and many discussions with prospective buyers of the property.

We have reviewed the files of the attorney for the bankrupt, and have reviewed the appraisals that he had previously had made from Mercer Simmons, M.A.I. We have also reviewed and discussed personally with Mr. David Reule, of Reule Investment Company, which is a subsidiary of Reule Realty Corporation, in Charlotte, who made an in depth analysis of these pieces of real estate in January of this year. Also, the entire Catawba County has been -- or just underwent a re-evaluation by the Catawba County tax collector's office under a State statute. So, what I'm saying to the Court in that respect is that we have Mercer Simmons' appraisal which he testified to on December 5, in court proceedings, before this Court in Charlotte, this last December. I have Reule's appraisal, which he made January 21, 1975. And, I have the new tax values for 1975 that have just been appraised, and,I might point out that Mr. Gaither and I got in on the tailend of it because of my appointment the latter part

of February. I objected to some of the values and a couple of them were lowered, but the rest were not. And I have with me today a petition to present to the Court. It's rather lengthy, but I would like to -- for the record today, in case someone wants to inquire about it, asking the Court for permission to waive any new appraisals. In this petition I set forth at length what I have just summarized in this respect, and I have summarized the descriptions of the property, the tax map reference, Deed Book page, and the existing leases and the outstanding first mortgages. As we all know, the separate pieces of real estate are subject to separate first mortgages. There is a blanket, or one deed of trust, which is a second deed of trust, on all of the parcels of real estate. In analyzing the situation -- oh, excuse me, these are the Reely appraisals that should be exhibits. In analyzing the appraisals and the outstanding balances on the real estate mortgages, it is a difficult decision as to how this

proceeding should proceed. Before I get back to that, however, let me say that as of today, and I brought it with me so that the Court would have it before it, we have collected and have on hand, cash in the amount of $50,168.33, as of today. The only tenant that has not paid the April payment -- rent payment today is Golden Travel Agency, which has changed its name now to Travel World. Perhaps I could rest before I make any further comments, or at least my opinion as to how it should progress. Maybe I should answer any questions at this time.

THE COURT: What is your recommendation to the Court as to how to proceed in this case?

MR. CAGLE: In sort of random fashion here. There are two other items of assets that I didn't mention a while ago. Number one, there are four filing cabinets and some file cardboard boxes out there in the Golden Shopping Center, which have a value of less than a hundred dollars, so that is of no consequence,

relatively speaking. There is a large number of display cases stored in Bekins, in North Hollywood, California. There is outstanding a storage bill thereon for the past year of a little over six thousand dollars. I have been communicating with their attorney, after I finally got their attention, and talked to a number of their officers, and they have been trying to find prospective buyers for that equipment for the past several months, in anticipation of selling it under a warehouse lien. They tell me that they have not been able to locate any buyers. The best opportunity to sell it would be to another discount type of operation, and the economy being what it is, they say to me, and I have no reason to doubt it, that they are hard-pressed to scurry up any prospective buyers, and I am in a quandry, based upon my correspondence and several telephone conversations with them out there, as to whether or not it is worth the time, effort and expense to get those items appraised out there, and try to sell

it. Okay, so my first impression on that -- those display cases, and I just this week got in the mail a list of them. There are about a little over 300 of them -- odd items, display cases, metal book racks, and things like that. My first impression on that is to abandon that to the warehouse in satisfaction of their storage lien. Okay, now that comes down to the basic real meat of the whole bankrupt asset, which is the real estate in Catawba County. And, the big item, of course, is the warehouse facility on Tate Boulevard. Now, in my opinion, and without being too immodest or modest whichever the phrase is, I'm not totally unknown to real estate transactions in Catawba County, and in my humble opinion that piece of real estate is unsellable at this time. I just do not believe that we're going to be able to find a buyer, either at a public or private sale for these reasons: number one, the economy, and number two, the existing leases run out in the option or at the option of the tenants, Superior Continental. One phase of it runs out August '75. The other half of the facility runs out December '76. Do you follow me? Okay, there is a first mortgage on this facility in the present amount -- let's say present principal amount of approximately $742,000.00. Mercer Simmons testified on December 5, 1974, that that real estate -- the Tate Boulevard property, and the additional five acres which is the undeveloped land right beside of it, which I call the entire Tate Boulevard property -- he testified that the value was $943,000.00. Okay, Mr. Reule's appraisal in January of '75, says $799,384.04. The 1975 Catawba County tax value is $599,310.00. Now, the value is probably there to equal what Mr. Mercer Simmons says is there. Simply the overall picture, the economy, and the demand. In Catawba County there are a lot of warehouse facilities vacant right now, and I just believe that that's going to be too difficult to do anything with. Now, the three vacant lots that First

Citizens Bank & Trust Company has a $150,000.00 mortgage on, two of them are residential lots, one is quasi-residential, quasi-office and institution. Okay, December 5, First Citizens says through their attorney that they thought it's probably -- the three lots are worth are probably worth $30,000.00. Well, I know exactly where they are and if they're worth $30,000.00 that's pushing it. The tax valuations for 1975 are one is $7,000.00, one is close to $7,000.00, and the non-residential lot is $10,000.00, and a few dollars. Okay, so, there is no equity in those lots. All right. However, the facility on Little Street, S.E., some of you may have it listed as 231 9th Street Lane, S.E., which some of you have been calling the Continental Supply facility. There is equity in that facility under everybody's opinion. Mercer Simmons testified December 5, 1974, that that facility was worth $360,000.00. Reule says in January '75, that it's worth $336,000.00. I'm forgetting a few dollars there. The '75 tax value is

$290,000.00. Okay. I have two oral requests to purchase it. One is in the amount of $300,000.00, and one is in the amount of $305,000.00. I think that's too low, frankly. The first mortgage balance on that one is in the approximate amount of $225,000.00. So, under everybody's appraisal there is equity there, of at least $80,000.00. Even, you know, at the $305,000.00 buyer that it can be sold for, I know, today, there is an $80,000.00 equity, minimum. And, based on the appraisal there is up to $125,000 to $135,000 equity there. Okay. The shopping center on 4th Street Drive, the Golden Shopping Center, Mercer Simmons has valued at $250,000.00, Mr. Reule says $256,000.00, the tax appraisals say $253,000.00. So, you see Mercer Simmons, Reule, and the tax appraisals are fairly close on most of them, with the exception of the Tate Boulevard property. All three of them are far apart on that but on all the others they are really close. That's why I don't think we ought to spend

more money on appraisals. But, let me go on to the other one. The balance on the first mortgage on the shopping center property is approximately $175,000.00. I'm talking about principal now. Okay, so there is at least $75,000.00 equity there. Okay, now the real estate on F Avenue, S.E., which some of you know as the M-e-p-e-l Building, Mercer Simmons says is worth $110,000.00. Reule says $98,000.00, and the tax value says for tax appraisals it's worth $104,950.00. The outstanding mortgage principal amount as of January 15, and I say January, maybe the date is wrong, but the month January, principal balance was $48,000.00. Now, we can see that there is an equity there somewhere between forty to sixty thousand dollars. I have an oral request, and somebody will put in a bid if we go that route to sell it, I have sort of a standing offer, I believe it's $94,000.00 on that one. Okay, so what I've done, and I've presented a copy of it to the Court, is prepared a memo here entitled "Trustee's Recommen-

dations," and under what I have just said, what I'm recommending is that the three pieces can be sold because there is clear cut equity there -- it can be sold, that is, by the buyer assuming the first mortgages and with the second lien holders then attaching to the proceeds-- that is, the equity. That is one method, and abandoning the other items of personal property. I have a second alternate for the Court's consideration and that is the same on the personalty, the filing cabinets and stuff in California -- abandon that, and consider the Trustee conveying his title to all the real estate to the second mortgage holders, and let the second mortgage holders then work things out between them and the first mortgage holders, which at that point I guess we could pretty well wrap the thing up. In effect, there wouldn't be anything left. And then, the third proposal really is to acquiesce or just agree to the mortgage holders filing their adversary proceedings to reclaim and foreclose under their deeds of

trust. But that would not -- a foreclosure would not net as much, I don't think. I don't think a foreclosure is what would be good for any creditor, whether they are secured or not. I don't see any hope while there is a possibility with interest rates coming down that these values and the real estate will continue to go up, there is that possibility. The problem is that the interest rates are going down faster than the demand is picking up. And I simply do not see any possibility of making a sale of any of these pieces, with the exception of the three that I mentioned, the shopping center, Mepel Building, and the Continental Supply building. And, frankly, if we sold them today, and I'm sure the second mortgage holders would say this, they would be selling them at too low. I'm sure the attorney for the bankrupt -- he's already stated we would be selling them too low, and I agree with him, because they should be worth more. The property should. So, when I started thinking of them in those terms, that

led me to the suggestion that maybe we ought to think in terms of the Trustee conveying his title to the second mortgage holders. You know there is a second mortgage for $360,000.00, and let them take it from there. Convey it to them subject to the first mortgages, in full satisfaction of their liens, which means nothing insofar as the other creditors are concerned because there wouldn't be any money for them. And then, of course, use the $50,000.00 cash, to pay the court cost first, cost of administration, and there are some bills pending that were incurred during the process of Chapter XI, that have been unpaid and need to be resolved. One item for example, and I'm not certain, Attorney George Huffman is here and maybe he can explain it, I'm sure, between him and Attorney Jim Gaither, one of these bills remaining unpaid during the administration of the Chapter XI is an item to Jack Sipe Construction Company for a sprinkler system, about twenty some thousand dollars. I'm not certain,

but I think -- my interpretation is that that bill -- that item was in addition to the $350,000.00 mortgage that Jack Sipe Construction and Mr. Butner and Mr. McKaughn have. Have I got everybody confused?

MR. HUFFMAN: Your Honor, concerning the sprinkler system, he is correct. Completion of the property last summer, approximately $21,500.00 due for the sprinkler system and a shortage in the disbursements from Shelby Savings & Loan which were applied to ad valorem taxes of an additional approximately $5,000.00. The total is approximately $26,500.00 on the completion of Phase II of the Tate Boulevard property.

THE COURT: Mr. Cagle, do you plan to make an application to the Court?

MR. CAGLE: I wanted to see what transpired here today before I did, but after today I realize that I'm going to have to. In my recommendation, although it is in writing, it is not in the form of a petition per se.

THE COURT: Any public sales of property through this Bankruptcy Court of course would be subject to confirmation by the Court. That might clear the way sometime for some private efforts if the public sale doesn't bring enough. Let me hear from any other creditor who wishes to be heard at this time.

MR. CASH: I represent Shelby Savings & Loan Association. I think Mr. Cagle has given a fair and probably accurate representation of the values in this matter. My client has two deeds of trust on two particular pieces of property. Id' like to clarify one thing. The Continental Supply facility that you speak of is on the east side of State Road No. 1653. Isn't that the Continental Supply?

MR. CAGLE: Yes, sir.

MR. CASH: Our first deed of trust is against what has been termed as the Continental Supply facility on the east side of State Road No. 1653, in Hickory, N. C., and presently there is a balance of $228,339.98 on this,

and the matter is three months delinquent, and the delinquency is $7,911.27, and I would agree with the Trustee that there appears to be equity there, so I would not request the Court to release this property. Now as to the second tract of property which is on the south side of Tate Boulevard, west of 15th Street, in Hickory, N.C., which is sometimes called the warehouse facilities, the Shelby Savings & Loan has a first deed of trust on that and the present balance is $760,148.81. This is also three months delinquent, in the amount of $24,339.81. Representing Shelby Savings & Loan Association we would make a motion at this time that this warehouse facility on which is owed $750,148.81, be released by the Trustee to the Trustee in the subject deed of trust. Mr. Cagle has stated that he feels that this is unsellable for three reasons and I would probably agree with him on those reasons. He said there is no equity in the property insofar as the Trustee is concerned. One, the economy, two, the existing leases

are running out in a relatively short period of time, and we would petition the Court at this time to release this unsellable piece of property to the Trustee in the deed of trust and the _____trust for sale under a deed of trust procedure.

THE COURT: Have you filed an adversary proceeding to recover property?

MR. CASH: No, sir, we have not. We'll be glad to do that.

THE COURT: I would advise you to do that, if that is what you want done in the proceeding so that the Trustee or any other interested party might file an answer in response to your request to recover the property for that purpose. Any other creditors wish to be heard at this time?

MR. BUTNER: If it please the Court, at this time I'd like to speak in behalf of Mr. Cagle's proposal here to reconvey this property to the second mortgage holders. It is the only possible way for the second

mortgage holders to recoup any portion or a substantial portion of the debts owed to the three. And, I'd just like to encourage the Court, in its equitable powers, to do just that, at the earliest possible date.

THE COURT: If I allow the Trustee to do that, how would the cost and expenses of administration that have been incurred to date be paid? What would be the possibility?

MR. BUTNER: We would hope, Your Honor, that the $50,000.00 cash that he has on hand would cover those expenses.

MR. CAGLE: If I might interrupt. If they would, while I have not discussed this with the second mortgage holders, if that amount would cover it, I believe that the second mortgage holders would waive any claim therein to it. I make that suggestion off the top of my head that they would be willing to, from what Mr. Butner has just said.

MR. BUTNER: I couldn't speak for the other two,

Your Honor, but for myself, I would be agreeable to do that.

MR. CAGLE: The only thing that would need to be resolved would be the unpaid bill to Jack Sipe Construction Company and these other items.

MR. GAITHER: May I speak, Your Honor? With respect to the sprinkler system, Your Honor, I feel like Jack Sipe Construction Company has been put in rather an awkward position by a combination of events. Superior Continental wanted that sprinkler system in there. It was not included in the overall construction bill, but had been included in the third mortgage. Yet, when they went over there to complete the building, I think Superior Continental was more or less adamant in wanting it in there, and they were getting ready to sign a lease and they agreed to make those payments available to pay that, with the understanding that they had to get Shelby Savings & Loan Association's permission to do that because they were entitled to the monthly pay-

ments under the lease. And there was a lot of talk and a lot of representation about that time with respect to Superior Continental signing a long term lease. And, if Superior Continental had signed a long term lease, I don't think we would have this problem, but Superior Continental has felt the effects of the economy also, and has found it necessary to cut back in a number of areas, and one of their cut backs is the reason, I think, that the Chapter XI failed by being unable to get a long term lease. Now, one point Mr. Huffman was stating, if we could just go in there and take the sprinkler system out, that would suit him fine because he had a place he could put it and use it. I don't know whether that's still true or not, but it would be -- you might consider holding a hearing on this matter and deciding. Because there is very little money for expenses of administration, etc., you might want to consider allowing them to go in and pull it out, because it was put in during the pendency of the XI, and it was put in in ad-

dition to the $110,000.00 that the Court awarded them to complete the -- in other words their contracts says to complete Phase II and does not include the sprinkler system but they went ahead in good faith, and put it in, in hopes of putting this whole thing together, and then Superior found it necessary to not commit themselves for a long term lease because of the economy and that's where we stand with it. And, if they could take it out and turn around and put it in another building somewhere, which at one point they said they could, I don't know whether they still can or not, and I wouldn't want to speak for them, but that might be a solution to that problem, and I just offer that for what it's worth. I'd just like to add that I don't intend to take away any value that you'll have over there without a proper--the Savings & Loan over there, I'm sure, maybe would like that thing to stay in there , but I'm just saying that there might ought to be a hearing on it.

MR. CASH: May it please the Court, representing

Shelby Savings & Loan, it is our opinion that the sprinkler system has been permanently affixed to the realty and, therefore, cannot be removed. It has acquired the character of realty.

THE COURT: That would be one of the problems resolved in an adversary proceeding that you bring.

MR. SIGMON: May it please the Court, William Sigmon for Fidelity Federal Savings & Loan Association, and First National Bank of Catawba County, which holds a first deed of trust on tracts of land and buildings in which there is substantial equity. These obligations have been in default for some time and it creates certain internal problems for the financial institutions and regulatory authorities which put pressure on them to resolve it. We would ask that this proceeding continue with all reasonable dispatch and we believe it would be faster to proceed and to bring adversary proceedings on behalf of first mortgage holders in this instance. But, we would like to ask for a prompt and speedy disposition

of this matter.

MR. HUCKLE: Your Honor, on behalf of Marine Midland, there was an order entered during the pendency of the arrangement compromising Marine Midland's claim and reducing it from an initial value of I think approximately $108,000.00 down to an unsecured claim of $67,000.00, and, the order also called for Marine Midland to file a proof of claim in the arrangement. Our client is concerned -- it doesn't seem like there is going to be much for unsecured creditors at this point. They would like to know if they have to file another proof of claim in this proceeding, or will the prior proof of claim carry over.

THE COURT: If you filed a proof of claim, the Court will make an order allowing the claims that have been filed in the XI proceeding to be treated as filed in this proceeding.

MR. HUCKEL: So we should prepare an order for your signature.

THE COURT: I believe the effect of it anyway would be to file one time. When and if I would call for claims--anything that was filed in the XI proceeding, is considered filed in this proceeding. If you want an order like that to pacify your client, or assure your client, I'd be glad to sign it, Mr. Huckle.

MR. HUCKLE: Thank you, Your Honor.

THE COURT: Any other creditor wish to be heard?

MR. GAITHER: Your Honor, could I bring up another problem as attorney for the debtor? Your Honor, when the Chapter XI was started, we obtained the services of an accountant, Mr. William J. Lawing, and the initial order appointing him allowed him -- there was a limit on what he should be paid, like $1,500.00. We got into the Chapter XI proceeding, and Mr. Lawing, and I guess myself too, Your Honor, were more or less unaware of that $1,500.00 limit, and the time came when Mr. Lawing wanted to be paid and wanted to present a bill to the Bankruptcy Court, and I filed an application

and it was picked up in the Bankruptcy Office that the application was for more than the order allowed. I discussed with the personnel entering a nunc pro tunc order allowing a greater amount or greater limit, because the length the thing ran and everything, I think I may even have filed something one other time that wasn't acceptable, and I'm faced with an unfinished duty really, I think, toward the accountant, assuming that his claim for services rendered is properly filed. Not that he would get everything he asked for, it's just that his claim is for approximately $4,000 and some dollars, and I have these other applications that have been marked filed and been "x'd" out because of the problems that existed, and I'm really asking the Court how may I properly get him filed before Your Honor for consideration with respect to his fee, in view of the fact that he does have -- he is asking for more than $1,500.00, and has probably performed services worth more than that.

THE COURT: There is nothing to prevent him from

filing application for fee determination and the creditors would be given notice of that in this proceeding so that they would have an opportunity to be heard.

MR. GAITHER: So he could just file it like it's a normal application pursuant to -- you see, he was appointed before the new rules went into effect, but I believe--

THE COURT: The fact that there was a limitation and that he exceeded that limitation would not work to his benefit, but there is nothing to prevent him from filing an application for allowance beyond that amount. I don't know what his reasons would be, but this is a Court of equity.

MR. GAITHER: Thank you.

THE COURT: I'm not disposed to believe that it would be in the best interest of all the creditors to convey that property to the second mortgage holders, Mr. Cagle. I'll have to take a while to digest that suggestion, and one of the reasons is I'm not sure what the extent

of the costs and expenses of administration are and how they should be borne by the creditors.

MR. CAGLE: Yes, I've been thinking about that myself. There should be, of course,-- the Court would have to consider several claims in that respect, court costs -- I feel like the Court should award the attorney for the debtor a fee, and then there's the C.P.A., that rendered services during the administration that should be paid as a cost of administration.

THE COURT: At the same time, I'm sympathetic with Mr. Sigmon's position that we ought to move on with the administration of this estate, and get sold that property that ought to be sold as soon as possible. There is no reason why, even if you make an application to do that, that you can't require that applications for allowances be filed before a certain date and get that on the road, get that started, and maybe set a hearing at which your application to sell the property free and clear of liens and encumbrances with liens to attach to

the proceeds or what other conditions you might ask the Court to sell the properties by, be considered, and applications for allowances to be considered at that time too. There is the possibility that if the public sale of the property doesn't bring enough for the Court to confirm it, it would be your duty to recommend confirmation or rejection for reasons known to you. The other alternative might still be available.

MR. CAGLE: Along that line of thought, the best procedure would be to have a public sale.

THE COURT: I think that would be best. Of course, that's your first step. If it doesn't work, we'll have to determine the allowances, cost and expenses of administration would be the figure that you would know what it would be.

MR. CAGLE: I want to sell it -- my thought, is to sell it subject to the first mortgages.

THE COURT: The sale can be ordered with any -- free and clear of all encumbrances, or free and clear

of all liens and encumbrances with exception of. Whatever they might be.

MR. CAGLE: Well we'd get more buyers, because nobody can come up with that kind of money now days. It's a problem.

THE COURT: Of course, I'm of the opinion that maybe a little delay may have helped this proceeding. Money seems to be more available now.

MR. CAGLE: Yes, money is more available and interest is going down, but, I think they're scrutinizing the lending closer then they use to, and I think people are more afraid to go and borrow a lot now. But, money is more available then it was say in December, for example.

THE COURT: If you'll make an application to sell free and clear of liens and encumbrances, with the exception of, if you want the first mortgage or subject to the first mortgage, make it in that way. We'll have one adversary proceeding which will be filed and we'll

try to make a determination maybe at the same time or with the reservation in your application to sale. The Tate Boulevard property may or may not be sold, I don't know. I haven't made a determination and I won't until I hear that adversary proceeding. There are some complications in that property.

MR. BUTNER: If it please the Court, Your Honor, I'll try and discourage him from that. That's the liability side of this real estate.

THE COURT: Mr. Cagle, I appreciate your report. You've done an excellent job and I appreciate the assistance in the administration of the estate.

MR. CAGLE: You do recall that I have a petition and proposed order regarding that one year lease. I tried to get a three year, but a one year will be that much more income.

THE COURT: Is there anyone who would want to speak in opposition to the Trustee getting some rentals for property that is currently being administered by

the bankrupt estate?

MR. CAGLE: It's enhancing everybody's position.

THE COURT: I have authorized you to enter into a lease.

MR. CAGLE: Thank you, Judge.

CERTIFICATE

I, Paulette H. Harris, Notary Public and Official Court Reporter for the Western District of North Carolina, do hereby certify the foregoing twenty-four (24) pages, to be a true, complete, and accurate transcript of the above proceedings, as reported by me on April 16, 1975.

This the 21st day of August, 1975.

/s/ Paulette H. Harris

My Notary Commission expires: July 7, 1980

Supreme Court, U. S.
FILED
JUL 26 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

Volume Two
Pages 405a-end

IN THE

SUPREME COURT OF THE UNITED STATES

Fall Term, 1978

No. 77-1410

William E. Butner, Petitioner,

vs.

United States, et al., Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Certiorari Filed April 4, 1978
Certiorari Granted June 12, 1978

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IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

In the Matter of: GOLDEN ENTERPRISES, INC.,

Debtor.

IN PROCEEDINGS FOR AN ARRANGEMENT

NO. ST-B-73-6

APPLICATION

To the Honorable Joseph R. Cruciani, United States Bankruptcy Judge:

The application of William E. Butner and Robert L. McKaughn, Jr., respectfully represents:

1. Your applicants have a second mortgage secured by a deed of trust upon certain real estate of the above debtor in the amount of Three Hundred Sixty Thousand ($360,000.00) Dollars. This deed of trust is recorded in Book 1051 at page 184, Catawba County Registry.

2. On May 4, 1973, said debtor filed a petition proposing an arrangement under Chapter XI of the Bank-

ruptcy Act.

3. An arrangement proposed by the debtor has been accepted by the creditors, but not confirmed by the court. Debtor has until March 31, 1975, to propose an amended Plan of Arrangement to the creditors.

WHEREFORE, your applicants pray that the court take one of the following actions:

1. That the within proceeding under Chapter XI be dismissed and that bankruptcy be proceeded with, or

2. That the court remove its stay of execution on the above-described deed of trust, or

3. That the within proceeding be converted to a proceeding under Chapter X of the Bankruptcy Act.

This the 30th day of December, 1974.

/s/ William E. Butner

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

(Caption omitted in printing)

ORDER FOR HEARING ON ADJUDICATION

OR DISMISSAL COMBINED WITH NOTICE THEREOF

To the Debtor, its attorney, standby trustee, creditors' committee and other parties in interest:

IT APPEARING TO THIS COURT that a hearing on indemnification under Rule 11-20 having been held on January 22, 1975, upon notice to the Debtor and other parties in interest and an order having been made for the Debtor to file an indemnity bond in the amount of $50,000.00 on or before February 5, 1975;

AND IT FURTHER APPEARING TO THIS COURT that the Debtor has failed to file the bond timely and no extension of time having been requested or granted;

IT IS THEREFORE ORDERED AND NOTICE IS HEREBY GIVEN THAT a hearing under Rule 11-42(b) will be held on Friday, February 14, 1975, at 10:00 a.m. in

Room 238, Main Post Office Building and Court House, Charlotte, North Carolina, for the purpose of considering whether or not this Debtor shall be adjudged a bankrupt or this proceeding dismissed.

IT IS FURTHER ORDERED that notice of less than 10 days be given to the Debtor and other parties in interest.

Dated at Charlotte, North Carolina, this the 10th day of February, 1975.

/s/ Joseph R. Cruciani

U. S. Bankruptcy Judge

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

MONTHLY FINANCIAL REPORT

April, 1975

409a

The undersigned Trustee submits the following report of receipts and disbursements in the month of April, 1975:

Cash Balance		$ 31,047.08
Rental Income Receipts:		
Beltone (March rent)	$ 538.87	
Beltone (April rent)	538.87	

410a

Travel World (March rent)	286.00	
Superior Continental (April rent)	3,276.04	
Superior Continental (April rent)	5,540.62	
Superior Continental (April rent)	4,750.00	
C.I.T. Financial Services (April rent)	487.50	
Iron Gate Restaurant (April rent)	652.44	
Metelpel (March rent)	1,015.62	
Metelpel (April rent)	1,015.62	
James M. Gaither, Jr., Atty. for Bankrupt	1,473.76	
North Carolina National Bank - Refund	6.00	19,581.34
Total Cash		$ 50,628.42

Cash Disbursements:

U. S. Postmaster - Post Office box rent	2.70	
Register of Deeds - Recording Order Approving Bond	2.00	
City of Hickory - Utility bill under lease	6.53	
City of Hickory - Utility bill under lease	6.53	
Duke Power Company - Utility bill under lease	127.28	
Duke Power Company - Utility bill under lease	88.22	
City of Hickory - Utility bill under lease	16.00	
Central Telephone Co. - Utility bill under lease	6.00	
Fassland Enterprises, Inc. - Repair heating and air conditioning	204.83	
		460.09

411a

Balance on Hand $ 50,168.33

*Rental payment for the month of April has not been received from Travel World.

*Of the Balance on Hand, $50,000.00 is deposited in a Passbook Savings Account at North Carolina National Bank.

This is to certify that the above represents a true and accurate record of the receipts and disbursements of the undersigned Trustee during the month of April, 1975, in the above-referenced estate.

412a

/s/ Joe N. Cagle, Trustee

P. O. Box 2050

Hickory, NC 28601

COUNSEL:

Joe N. Cagle, Attorney

CAGLE AND HOUCK

P. O. Box 2050

Hickory, NC 28601

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

MONTHLY FINANCIAL REPORT

May, 1975

The undersigned Trustee submits the following report of receipts and disbursements in the month of May, 1975:

Cash Balance		$ 50,168.33
Rental Income Receipts:		
Beltone (May rent)	$ 538.87	
Superior Continental (May rent)	3,276.04	

Superior Continental (May rent)	5,540.62	
Superior Continental (May rent)	4,750.00	
C.I.T. Financial Services (May rent)	487.50	
Iron Gate Restaurant (May rent)	652.44	
Metelpel (May rent)	1,015.62	
Capitol Credit (1/2 April rent & May rent)	525.00	
Frelon Broome Insurance (May rent)	350.00	$ 17,136.09
Total Cash		$ 67,304.42

415a

Cash Disbursements:

Advanced Court Reporters, Inc. - Appearance fee - 4/16/75	$ 20.00	
City of Hickory - Utility bill under lease	16.00	

416a

City of Hickory - Utility bill under lease	6.53	
City of Hickory - Utility bill under lease	6.53	
Central Telephone Co. - Utility bill under lease	6.00	
Duke Power Co. - Utility bill under lease	54.49	
Duke Power Co. - Utility bill under lease	55.21	
Duke Power Co. - Utility bill under lease	58.73	
Frelon Broome - Repair to door	1.25	
City of Hickory - Utility bill under lease	13.06	$ 237.80
Balance on hand		$ 67,066.62

*Rental payments for the month of April and May have not been received from Travel World.

*Of the Balance on Hand, $66,000.00 is deposited in a Passbook Savings Account at

North Carolina National Bank.

This is to certify that the above represents a true and accurate record of the receipts and disbursements of the undersigned Trustee during the month of May, 1975, in the above-referenced estate.

/s/ Joe N. Cagle, Trustee

P. O. Box 2050

Hickory, NC 28601

COUNSEL:

Joe N. Cagle, Attorney

CAGLE AND HOUCK

P. O. Box 2050

Hickory, NC 28601

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

Bankruptcy No. ST-B-73-6

IN RE: Golden Enterprises, Inc.

FIRST-CITIZENS BANK AND TRUST CO., PLAINTIFF,

VS: JOE N. CAGLE, Trustee in Bankruptcy for

GOLDEN ENTERPRISES, INC., DEFENDANT.

JUDGMENT (By Consent)

THIS CAUSE coming on to be heard before the Honorable Joseph R. Cruciani, U. S. Bankruptcy Judge, in Charlotte, North Carolina, upon the Plaintiff's Complaint seeking to recover property from the Defendant, as appears more fully from the Plaintiff's Complaint and Prayer for Relief filed in this action, and the Plaintiff and the Defendant having agreed upon a basis for the Judgment of matters alleged in the Complaint and the entry of a Judgment in this action, and after due deliberation being had thereon, now on motion of

Counsel for the Plaintiff, it is

ORDER, ADJUDGED AND DECREED that final Judgment in favor of the Plaintiff and against the Defendant is hereby granted and ordered as the Judgment in this action as follows:

That the three (3) lots shown and described on Exhibit "B" attached to the Plaintiff's Complaint in this action be released and discharged from the Bankruptcy Proceeding No. ST-B-73-6 and that the Plaintiff be allowed to pursue the remedies available to it under the laws of the State of North Carolina for default in payment of a note and deed of trust.

This the 4th day of June, 1975.

/s/ Joseph R. Cruciani

U. S. Bankruptcy Judge

/s/ Joe N. Cagle

Trustee in Bankruptcy for Golden

Enterprises, Inc.

P. O. Box 2050

Hickory, North Carolina 28601

Telephone: 704-322-2207

/s/ Charles R. Young

Attorney for Plaintiff

P. O. Drawer 2428

Hickory, North Carolina 28601

Telephone: 704-322-4663

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

BANKRUPTCY NO. ST-B-73-6

JOE N. CAGLE, Trustee in Bankruptcy for Golden Enterprises, Inc., Bankrupt, Plaintiff, vs. SHELBY SAVINGS & LOAN ASSOCIATION and JOSEPH C. WHISNANT, as Trustee; THE FIRST NATIONAL BANK OF CATAWBA COUNTY and JAMES M. GAITHER, JR., as Trustee; FIDELITY FEDERAL SAVINGS AND LOAN ASSOCIATION and LEE DENNIS, as Trustee; W. E. BUTNER, ROBERT L. McKAUGHN, JR., JACK SIPE CONSTRUCTION CO., and J. CARROLL ABERNETHY, JR., as Trustee; EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA; CATAWBA COUNTY TAX COLLECTOR; and CITY OF HICKORY TAX COLLECTOR, Defendants.

COMPLAINT (To Sell Real Estate and Transfer Certain Liens to Proceeds of Sale)

Plaintiff complains of the Defendants as follows:

I.

The Plaintiff is the duly appointed, qualified and acting Trustee in Bankruptcy for Golden Enterprises, Inc., which was adjudged a bankrupt on February 14, 1975.

II.

The Defendants are all parties having a lien or secured interest in and to the real estate of the Plaintiff.

III.

Among the assets belonging to the estate of the said Bankrupt and in the possession of the Plaintiff as Trustee in Bankruptcy is the real estate described, valued, and subject to the liens, as hereinafter set forth:

A. Warehouse and office located at 1516 F Avenue, S. E., Hickory, North Carolina (known as Metelpel Products Building). This real estate is more particularly described in Deed Book 927 at Page 208, in the Office of the Register of Deeds for Catawba County. This property is also reflected in Catawba County Tax Map 60H--Block 4--Lot 26.

Leased to Metelpel Products, Inc., a division or subsidiary of Superior Continental Corporation--Term 3/24/70 to 3/23/85 at an annual rental of $12,187.50.

This real estate is subject to a first Deed of Trust to James M. Gaither, Jr., in favor of The First National Bank of Catawba County, dated February 19, 1971, in the original amount of $74,000.00, recorded in Deed Book 967 at Page 160, in the Office of the Register of Deeds for Catawba County.

Mercer Simmons, MAI, Appraisal--December 5, 1974--$110,000.00 Reule Investment Company, Appraisal--January 21, 1975--$98,766.09 1975 Catawba County Tax Appraisal--$104,950.00

B. Real estate known as Office Complex or Shopping Center located on Fourth Street Drive, S. W., Hickory, North Carolina. This real estate is more particularly described in Deed Book 986 at Page 421 in the Office of the Register of Deeds for Catawba County. This property is also reflected in Catawba County Tax Map

4311--Block 10--Lot 36B.

Spaces leased as follows:

(a) CIT Financial Services, Inc.

Square feet--1,500

Term--6/1/72 - 5/31/77

Rent--$437.50 per month

(b) Fassland Enterprises, Inc.

Square feet--2,409

Term--5 year lease

Rent--$652.44 per month

(c) Golden Investment Company, Inc.

Square feet-868

Term--5 year lease

Rent--$325.00 per month

(d) Benny Young and Ardith Young (Beltone)

Term--6/1/73 - 5/31/78

Rent--$538.87 per month

(e) New lease by Trustee to Capitol Credit

Rent--$350.00 per month

(f) New lease by Trustee to Frelon Broome Insurance Agency

Rent--$350.00 per month

This real estate is subject to a first Deed of Trust to Lee Dennis, Trustee in favor of Fidelity Federal Savings and Loan Association, dated August 11, 1972, in the original amount of $200,000.00, recorded in Deed Book 1005 at Page 495, in the Office of the Register of Deeds for Catawba County.

Mercer Simmons, MAI, Appraisal--December 5, 1974--$250,000.00 Reule Investment Company, Appraisal--January 21, 1975--$256,077.93 1975 Catawba County Tax Appraisal--$253,710.00

C. Real estate on Little Street, S. E. (231 Ninth Street Lane, S. E.), Hickory, North Carolina. This real estate is more particularly described in Deed Book 947 at Page 415 in the Office of the Register of Deeds for Catawba County. This property is also reflected in Catawba County Tax Map 59H--Block 1--Lot 3.

Leased to Continental Systems Supply, a division or subsidiary of Superior Continental Corporation. Term--15 years (1971 - 1986). Annual rent is $39,100.00.

This real estate is subject to a first Deed of Trust to Joseph C. Whisnant, Trustee in favor of Shelby Savings and Loan Association, dated February 11, 1971, in the original amount of $260,000.00, recorded in Deed Book 967 at Page 28, in the Office of the Register of Deeds for Catawba County.

Mercer Simmons, MAI, Appraisal--December 5, 1974--$360,000.00 Reule Investment Company, Appraisal--January 21, 1975--$336,257.87 1975 Catawba County Tax Appraisal--$290,240.00

D. The warehouse facility located at 1120 Tate Boulevard (Eastern Access), Hickory, North Carolina. This real estate is more particularly described in Deed Book 990 at Page 629 in the Office of the Register of Deeds for Catawba County. This property is also reflected in Catawba County Tax Map 60H--Block 1--Lot 11.

This facility is leased as follows:

Phase I to Superior Continental Corporation

Term--1/1/74 to 12/31/76, 2 year option

Phase II to Superior Continental Corporation

Term--8/1/74 to 8/1/75

Rent--$1.25 per square foot

Phase II to Butner, McKaughn, and Sipe

Term--8/1/75 to 7/31/77

Rent--$.60 per square foot

The major portion of this real estate is subject to a first Deed of Trust to Joseph C. Whisnant, Trustee in favor of Shelby Savings and Loan Association, dated April 2, 1973, in the original amount of $755,000.00, recorded in Deed Book 1020 at Page 660 in the Office of the Register of Deeds for Catawba County.

Mercer Simmons, MAI, Appraisal--December 5, 1974--$943,000.00 Reule Investment Company, Appraisal--January 21, 1975--$799,384.04 1975 Catawba County Tax Appraisal--$599,310.00

IV.

All of the real estate hereinabove described is subject to a Deed of Trust dated June 5, 1974, to J. Carroll Abernethy, Jr., Esquire, Trustee in favor of William E. Butner and Robert L. McKaughn, Jr., and Jack Sipe Construction Co., in the original sum of $360,000.00 filed for record on June 7, 1974, and recorded in Deed Book 1048 at Page 76 in the Office of the Register of Deeds for Catawba County. (See Amendment to Deed of Trust recorded in Deed Book 1051 at Page 184, Catawba County Registry.) NOTE: The Deed of Trust dated March 13, 1973, from Golden Enterprises, Inc., to James M. Gaither, Jr., Esquire, Trustee in favor of William E. Butner and Robert L. McKaughn, Jr., securing the original sum of $250,000.00, recorded in Deed Book 1018 at Page 788, Catawba County Registry, does not appear to be cancelled.

V.

The said Jack Sipe Construction Co., filed a Notice

of Claim of Lien in the Office of the Clerk of Superior Court of Catawba County, North Carolina, on March 14, 1975, claiming a lien on the real estate of the Plaintiff as described in Deed Book 990 at Page 636 and Deed Book 990 at Page 629, Catawba County Registry, for labor and materials furnished between February 28, 1972, and November 15, 1974. On information and belief, part or all of this indebtedness is secured by the second Deed of Trust referred to in the preceding paragraph. On information and belief, a part of the indebtedness was incurred during the period of the Arrangement proceedings. Moreover, the Plaintiff believes that this Notice of Claim of Lien is incorrect in amount, and legally invalid in that the same has not been perfected. Furthermore, the said creditor filed this Notice in violation of Bankruptcy Rules 401 and 601.

VI.

The Employment Security Commission of North

Carolina filed a Lien for the sum of $2,036.24 in the Office of the Clerk of Superior Court for Catawba County, North Carolina, on December 10, 1973, which is docketed in Judgment Book 11 at Page 38.

VII.

On information and belief, ad valorem taxes in the approximate amount of $2,500.00 are due the City of Hickory for the year 1974. On information and belief, all ad valorem taxes due the County of Catawba have been paid through the year 1974. The Catawba County Tax Collector and the City of Hickory Tax Collector have liens against the real estate hereinabove described (within their respective taxing jurisdictions) pursuant to the Statutes of the State of North Carolina, for the current year's taxes, which are not yet due and payable.

VIII.

It is in the best interest of the estate of the Bankrupt that the said real estate be sold at public auction,

free and clear of all liens and encumbrances except the first mortgages and current year ad valorem taxes, and that the rights of all other secured parties be transferred to the proceeds. A public sale of the said real estate in this manner will materially promote the interests of all creditors. Moreover, on information and belief, it is necessary to sell the real estate of the Bankrupt in order to liquidate the assets and provide funds for payment of the expenses of the administration of the Bankruptcy proceedings.

IX.

The time is of the essence in this matter and the Plaintiff believes that the time for any Defendant to file answer herein should be reduced to ten (10) days or less.

WHEREFORE, the Plaintiff demands judgment as follows:

1. That the Defendants be required to serve answer herein within a period of not more than ten (10) days

from the date of service.

2. That the Trustee be authorized to sell the real estate hereinabove described at public auction, free and clear of all liens and encumbrances except the first Deeds of Trust thereon and the current year's ad valorem taxes.

3. That the rights of all other lienholders and secured parties be transferred to the proceeds of said sale for a determination and marshalling by the Court.

4. That the Trustee be authorized to advertise the public sale of the real estate in a newspaper published in Catawba County, North Carolina, and in such other newspapers as he deems fit at least once a week for two successive weeks and to charge the same as a part of the costs of administration.

5. That the public auction of the real estate be made subject to the confirmation of the Court.

6. That the costs of this proceeding, including all costs incidental to the public sale of the real estate,

be charged as a part of the costs of administration.

This the 9th day of June, 1975.

/s/ Joe N. Cagle, Trustee

(Verification omitted in printing)

(Jurat omitted in printing)

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

MONTHLY FINANCIAL REPORT

June, 1975

The undersigned Trustee submits the following report of receipts and disbursements in the month of June, 1975:

Cash Balance		$ 67,066.62
Rental Income Receipts:		
Beltone (June rent)	$ 538.87	
Superior Continental (June rent)	3,276.04	

Superior Continental (June rent)	5,540.62	
Superior Continental (June rent)	4,750.00	
C.I.T. Financial Services (June rent)	487.50	
Iron Gate Restaurant (June rent)	652.44	
Metelpel (June rent)	1,015.62	
Travel World (April rent)	325.00	
Frelon Broome Insurance (June rent)	350.00	$ 16,936.09
Total Cash		$ 84,002.71

Cash Disbursements:

City of Hickory - Utility bill under lease	16.00	
City of Hickory - Utility bill under lease	6.53	
City of Hickory - Utility bill under lease	6.53	
Central Telephone Co. - Utility bill under lease	6.00	
Duke Power Co. - Utility bill under lease	85.90	
Duke Power Co. - Utility bill under lease	36.58	
Duke Power Co. - Utility bill under lease	41.60	$ 199.14
Balance on hand		$ 83,803.57

*Rental payments for the month of May and June have not been received from Travel World; rental payment for the month of June has not been received from Capitol Credit.

*Of the Balance on Hand, $82,000.00 is deposited in a Passbook Savings Account at North Carolina National Bank.

This is to certify that the above represents a true and accurate record of the receipts and disbursements of the undersigned Trustee during the month of June, 1975, in the above-referenced estate.

/s/ Joe N. Cagle, Trustee

P. O. Box 2050

Hickory, NC 28601

COUNSEL:

Joe N. Cagle, Attorney

CAGLE AND HOUCK

P. O. Box 2050

Hickory, NC 28601

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

BANKRUPTCY NO. ST-B-73-6

JOE N. CAGLE, Trustee in Bankruptcy for Golden Enterprises, Inc., Plaintiff, vs. SHELBY SAVINGS & LOAN ASSOCIATION, et al., Defendants.

ORDER

THIS CAUSE coming on to be heard and being heard before the undersigned U.S. Bankruptcy Judge upon Complaint of Joe N. Cagle, Trustee, for authorization to sell the real estate of Golden Enterprises, Inc., and after review and consideration of the Complaints, Answers, and other evidence, including arguments of counsel in open court on June 30, 1975, and due deliberation being had thereon, the Court hereby enters its findings and order as follows:

1. That Joe N. Cagle is the duly appointed and now acting Trustee in Bankruptcy for the above-named

Bankrupt.

2. That the Court has jurisdiction of the subject matter and jurisdiction over the parties named herein.

3. That it is in the best interest of the estate of the Bankrupt that the said real estate be sold at public auction, free and clear of all liens and encumbrances, except the first mortgages and current year ad valorem taxes, and that the rights of all other secured parties be transferred to the proceeds. A public sale of the said real estate in this manner will materially promote the interests of all creditors.

4. That it will be in the best interest of the estate of the Bankrupt that the Trustee be authorized to advertise the public sale in a newspaper published in Catawba County, North Carolina, and in any other newspapers as the Trustee in his discretion may decide, and charge the costs thereof to the costs of administration.

THEREFORE, IT IS ORDERED AND DECREED as

follows:

1. That the Trustee be and he is hereby authorized to sell the real estate of the Bankrupt at public auction, free and clear of all liens and encumbrances except the first Deeds of Trust thereon and current year's ad valorem taxes, and that the sale be held on the 28th day of July, 1975, beginning at 10:00 o'clock a. m.

2. That the rights of all other lienholders and secured parties be transferred to the proceeds of said sale for a determination and marshalling by the Court.

3. That the Trustee be and he is hereby authorized to advertise the public sale of the real estate in a newspaper published in Catawba County, North Carolina, and in such other newspapers as he deems fit at least once a week for two successive weeks and to charge the same as a part of the costs of administration.

4. That the public auction of the real estate be made subject to the confirmation of the Court.

5. That the costs of this proceeding, including all

costs incidental to the public sale of the real estate, be charged as a part of the costs of administration.

This the 30th day of June, 1975.

/s/ Joseph R. Cruciani

U. S. Bankruptcy Judge

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

(Caption omitted in printing)

PROOF OF CLAIM IN BANKRUPTCY

William E. Butner, of No. 27 First Avenue N. E. Street _____ in Hickory, County of Catawba, State of North Carolina Zip Code 28601, says:

1. (a) IF CLAIMANT IS AN INDIVIDUAL, check here x:

That he is the claimant herein.

(1(b), 1(c), 1(d) omitted in printing as not applicable)

2. That the above-named bankrupt (or debtor) was, at the time of the filing of the petition herein, and still is, justly and truly indebted (or liable) to the claimant in the sum of Three Hundred Sixty Thousand dollars

3. That the consideration of this debt (or liability) is as follows: monies loaned

4. That no part of the debt (or liability) has been paid except none

5. That there are no set-offs or counterclaims to the

debt (or liability) except none

6. That claimant does not hold, and has not had or received, any security for the debt (or liability), nor has any person by the claimant's order or knowledge or belief had or received any security for the debt (or liability) for the claimant's use except Note and Deed of Trust dated July 1, 1974, recorded in Book 1051 at page 184, Catawba County Registry. (See Exhibit "A" attached hereto.)

7. (omitted in printing as not applicable)

8. (omitted in printing as not applicable)

9. This claim is filed as an (SECURED) CLAIM.

$ 360,000.00 Total Amount Claimed

Dated at Hickory, North Carolina, thic 1st day of July 19 75

Signed William E. Butner

Name of individual, agent, officer, or partner signing this claim.

NOTE: Failure to complete all necessary parts of this

form may result in disallowance.

PENALTY FOR PRESENTING FRAUDULENT CLAIM - Fine of not more than $5,000 or imprisonment for not more than five years or both - Title 18, U.S.C., Sec. 152.

Exhibit "A"

Mail To: Butner and Gaither, Attorneys at Law;

Post Office Box 2323, Hickory, North Carolina

CORPORATION DEED OF TRUST - Form CDT-402

Printed and for sale by James Williams & Co., Inc.

Yadkinville, N. C.

STATE OF NORTH CAROLINA, CATAWBA County.

THIS DEED OF TRUST, Executed this 1st day of July, 1974, by and among Golden Enterprises, Inc. a corporation organized and existing under the laws of the State of North Carolina, hereinafter called Grantor; J. Carroll Abernethy, Jr., hereinafter called Trustee; and William E. Butner, Robert L. McKaughn, Jr., and Jack Sipe Construction Company hereinafter called Note Holder;

WITNESSETH: That whereas said Grantor has this day executed and delivered to said Note Holder a promissory note in the sum of THREE HUNDRED SIXTY THOUSAND ($360,000.00) Dollars, with interest there-

on from date at the rate of ten per cent per annum, said principal and interest being payable as follows:

On or before fifteen (15) years from the date of execution with interest payable quarterly at the rate of ten (10%) per cent per annum with the payments to be applied first to interest and then to principal.

If any one of said payments or any part thereof be overdue and unpaid for ten (10) days, the holder of the note hereby secured may declare the entire sum due and payable; and with the further right in Grantor to make additional payments thereon or to pay said note in full at any time within penalty for such prepayment.

AND WHEREAS, It has been agreed that the payment of said note shall be secured by the conveyance of the land hereinafter described;

NOW, THEREFORE, in consideration of the premises and for the purpose aforesaid and for one dollar paid

by the Trustee, the receipt of which is hereby acknowledged, said Grantor has bargained and sold and by these presents does bargain, sell and convey unto said Trustee, his heirs, successors, and assigns, premises in Hickory Township, Catawba County, North Carolina, described as follows:

TRACT NO. I:

BEGINNING at an iron stake, the northeast corner of the property owned by Martel Company and running thence with the northern line of said Martel Company North 86° 24' West for 427.69 feet to an iron pin located in the eastern margin of the right of way of Little Street, now State Road No. 1653; thence with the eastern margin of the right of way of Little Street for the following calls and distances: North 1° 02' West for 340.36 feet to an iron stake thence North 1° 38' West for 154.80 feet to an iron stake; thence along a curve, the eastern margin of said road, whose cord is 156.23 feet; cord bearing North 6° 05' West to an iron stake

located in the western margin of a 20-foot road, the old line, said corner being 331 feet South of the center line of "C" Avenue, S. E.; thence with the old line, the western margin of a 20-foot road, South 33° 50' East for 814.83 feet to the point of BEGINNING and containing 3.11 acres, according to a plat of a survey made by Donald S. Miller, Registered Surveyor, of the John S. Little Estate made in December of 1969. The above-described property is conveyed subject to any and all recorded street roadways or utility easements.

TRACT NO. II:

BEGINNING at an iron pin, said pin being the Southwest corner of Tract No. 5 of the Walton C. Yount Estate property as recorded in Plat Book 3, Page 81, Catawba County Registry, and being located North 46° 46' West 150 feet from the center of 3rd Avenue Drive, S. E.; thence from said point of Beginning, North 61° 47' East 416.7 feet to a point in the John S. Little Estate

property line; thence leaving the John S. Little Estate property line and establishing a new line, South 70° 30' East 150.31 feet; thence North 36° 36' East 17.46 feet; thence South 53° 24' East 56.75 feet; thence South 70° 30' East 402.05 feet to a point in Lot No. 3 of the Walton C. Yount Estate property, now owned by Regal Manufacturing Company; thence with the line of Regal Manufacturing Company, South 35° 39' West 392.16 feet to an iron pin in the line of Lot No. 5 of the Young property, the Southwest corner of Tract No. 3 of the Yount property; thence South 69° West 152.93 feet to an iron pin; thence South 58° West 135 feet to an iron pin in the South line of Tract No. 5 of the Walton C. Yount Estate property; thence North 46° 46' West 487 feet to an iron pin in the middle of 3rd Avenue Drive, S. E.; thence continuing the same call 150 feet to the point of BEGINNING. Being Tract No. I and a portion of Tract No. III of the property of Golden Enterprises, Inc., as surveyed by Marion E. Bolch, Registered Surveyor, on May 12, 1972.

TRACT NO. III:

BEGINNING at an iron pin in the southern margin of F Avenue, Southeast, said iron pin being located South 67° 39' East 150.0 feet from 15th Street, Southeast; thence from said beginning point with the southern margin of F Avenue, Southeast, South 67° 39' East 151.0 feet to an old iron pin, C. W. Fox's Northwest corner; thence with Fox's line South 7° 58' West 289.56 feet to an old iron pin, a corner of S. E. Price; thence with Price's line North 51° 55' West 27.9 feet to an old iron pin; thence continuing with Price's line North 68° 29' West 198.3 feet to an old iron pin; thence North 22° 48' East 275.85 feet to the point or place of BEGINNING. The same being all of Lots 12 through 17, inclusive, in Block "B" of the St. Stephens Lutheran Church property as shown on a plat thereof recorded in Plat Book 7 at Page 126, in the Catawba County Public Registry.

TRACT NO. IV:

BEGINNING at an iron stake in the eastern margin of Fourth Street, S. W., immediately adjoining a stone wall of the Ridgeview Cemetery, and running thence with the margin of said street North 18° 06' West 33.47 feet to an iron stake; thence continuing with said margin North 1° 35' West 90.12 feet to an iron stake; thence continuing with said margin North 8° 51' East 175.02 feet to an iron stake, the southwestern corner of the property sold from the City of Hickory to Superior Automobile Insurance Company (occupied by Stephenson Finance Company); thence with Superior southern line North 79° 46' 40" East 148.41 feet to an iron stake in the western line of Elijah Covington (A. H. Field); thence with Covington's western line and the western line of Dr. R. W. Carver, South 24° 46' East 227.63 feet to an iron stake in Carver's line; thence with the line of Ridgeview Cemetery South 65° 52' West 279.82 feet to the point of BEGINNING, containing 1.29 acres, more or less. This description was taken from a sur-

vey by the City of Hickory Engineering Department on September 9, 1966.

TRACT NO. V:

BEGINNING at an iron pin, said pin being the Southwest corner of Tract No. 3 and the Southeast corner of Tract No. 4 of the Walton C. Yount Estate property as shown in Plat Book 3 at Page 81, Catawba County Registry, and running thence from said point of Beginning South 69° West 152.93 feet to an iron pin; thence South 58° West 135 feet to an iron pin in the line of Avery Yount, Tract No. 6 of the plat herein referred to; thence South 46° 46' East 840 feet to an iron pin, the Southeast corner of this tract; thence North 20° 11' East 375 feet to an iron pin, said pin being the Southeast corner of Tract 5 of the Walton C. Yount property; thence with the southern line of Tract No. 3 of the Walton C. Yount property, North 54° 47' West 593 feet to the point of BEGINNING.

TRACT NO. VI:

BEGINNING at an iron pin in the southern margin of the right of way of Tate Boulevard, said pin being located North 61° 47' East 431 feet from the Southwest corner of Tract No. 4 of the Walton C. Yount property, as recorded in Plat Book 3 at Page 81, Catawba County Registry, and running thence from said point of Beginning, South 61° 47' West with the John S. Little Estate property line 250 feet to a point in said line; thence leaving the Little line and establishing a new line that runs with Tract No. IV-A, supra, South 70° 30' East 608 feet, more or less, to a point in the line of Tract No. 3 of the Walton C. Yount property, now owned by Regal Manufacturing Company; thence with the line of Regal Manufacturing Company North 35° 39' East 250 feet to an iron pin; thence North 59° 33' West 70 feet, more or less, to a point; thence with the southern right of way of Tate Boulevard North 79° 17' West 450 feet, more or less, to the point of BEGINNING.

TRACT NO. VII:

BEGINNING at a point in the Eastern margin of 9th Street, N. W., said beginning point being located 65 feet in a Southerly direction from the point of intersection of the Eastern margin of 9th Street, N. W. and the Southern margin of 3rd Avenue, N. W., said beginning point also being located at the point of intersection of the right of way line granted to the North Carolina State Highway Commission in the Eastern margin of 9th Street, N. W., and runs thence from said beginning point with the Eastern margin of 9th Street, N. W. in a Southerly direction 220 feet to a point; thence South 82° 05' East 120 feet to a point in the right of way line of the North Carolina State Highway Commission; thence with said right of way line the following approximate calls and distances: North 38° East 20 feet to a point; North 3° East 35 feet to a point; North 7° West 140 feet to a point; North 55° 15' West 30 feet to a point; North 88° 30' West 40 feet to the BE-

GINNING.

TRACT NO. VIII:

BEGINNING at an iron pin in the southern line of the Luther Huffman property, and which iron pin is South 86° 36' West 41 feet from Huffman's southeast corner of the Dr. David Frye line and runs South 86° 36' West with the southern line of the Huffman property 41 feet to an iron pin; thence the same direction with said line 165 feet to an iron pin, the northeast corner of the 50-ft. drive; thence with the eastern line of said 50-ft. drive, South 3° 15' East 125 feet to an iron pin at the commencement of the northern margin of the circular drive; thence an arc having R-25.0, L-39.27, triangle-90 to an iron pin; thence again with the northern margin of the circular drive North 86° 45' East 30.11 feet, and again South 82° 40' East 34.89 feet to an iron stake, a corner of Lot No. 2; thence with the line of Lot No. 2 North 33° 26' East 195.16 feet to the point of the BEGINNING.

TRACT NO. IX:

BEGINNING at an iron stake in the Western line of the Dr. David Frye property, the Northeast corner of Lot No. 3 of the property hereinafter designated, which Lot No. 3 has been conveyed to R. Carroll Burns, Jr. by Charles L. Hunsucker, Jr., et ux; thence with the Northern line of Lot No. 3, South 65° 52' West 151.41 feet to an iron stake in the Eastern margin of the circular drive; thence with the said margin of the circular drive North 34° 44' West 40.91 feet to an iron pin; thence again with the margin of the said circular drive, North 59° 38' West 40.96 feet to an iron pin, the Southeast corner of Lot No. 1 of the property hereinafter designated; thence with the line of Lot No. 1 North 33° 26' East 195.16 feet to an iron pin in the Southern line of the Luther Huffman property; thence with his line North 86° 36' East 41 feet to an iron pin, Huffman's Southeast corner in the Dr. David Frye line; thence with the Frye line South 17° 03' East 165.0 feet to the

point of BEGINNING.

BEING Lot No. 2 of that subdivision known as Pinewood Circle, Hickory, Catawba County, North Carolina, as surveyed by M. Bolch, June 14, 1966, a plat of which is registered in Book of Plats 13 at page 39 in the Catawba County Registry, to which plat reference is hereby made for a more particular description.

Tracts Nos. II, V and VI are conveyed subject to any and all easements, encumbrances, and rights of way recorded in the Catawba County Registry.

Tract No. VIII is conveyed subject to those certain restrictions recorded in Book 990 at page 39, Catawba County Registry.

Tract No. IX is conveyed subject to those certain restrictions recorded in Book 961 at page 155, Catawba County Registry.

All of the tracts described above are subject to ALL existing mortgages as they appear of record.

The purpose of this deed of trust is to correct an

error in the terms for repayment of that certain deed of trust dated June 5, 1974, and recorded in Book 1048 at page 76 in the Catawba County Registry.

The above land was conveyed to Grantor by _____ ____. See Book No.____, Page____.

TO HAVE AND TO HOLD the above described premises together with all the rights, privileges and appurtenances thereunto belonging unto said Trustee and his heirs, successors and assigns forever upon the terms and conditions and for the uses and purposes following:

FIRST: Grantor shall pay all taxes and other assessments within the time prescribed by law and shall keep the buildings on said premises in a proper state of repair and preservation, and insured against loss by fire and storm in some reliable insurance company having an office in the County of _____ in the amount of $360,000.00, which policies shall be payable to the Note Holder as his interest may appear and be deposited with him, to be applied in case of loss, so far as the same may extend or may be necessary in the payment of said note; and further, Grantor shall keep the property herein conveyed free and clear of any and all en-

cumbrances which by law may have a priority over the lien created by this trust.

And if Grantor shall fail to pay said taxes or assessments, or to maintain said property in a proper state of repair and preservation, or to effect and continue said insurance in force, or shall fail to keep said prop erty free of all encumbrances, the Note Holder shall have the right to pay said taxes or assessments, or to make said repairs or to effect and continue said insurance or to pay off and remove said encumbrances, and any amount so expended by him shall be deemed principal money secured by this trust bearing interest at the rate of ten (10%) per cent per annum, and be due and payable when the next ensuing installment on the note becomes due.

SECOND: If the said Grantor shall well and truly pay in full the indebtedness hereby secured, then the title to the land herein conveyed shall become revested in him free and discharged from the lien of this trust.

THIRD: But if said Grantor shall fail to pay any installment of either principal or interest as the same may hereafter become due, or any amount expended by the Note Holder for insurance or for taxes or for assessments, or to remove any encumbrances as herein provided, then upon any default or breach of the Grantor hereunder for a period of ten (10) days, it shall be lawful for and the duty of the Trustee, upon demand of the Note Holder, or his assigns or other person who may be entitled to the moneys due on said Note, to sell said land at public auction to the highest bidder for cash, after having advertised such sale by posting a notice thereof for thirty days at the Catawba County Courthouse building, located at Newton, North Carolina Catawba County, North Carolina, and by the publication of such notice once a week for four successive weeks in some newspaper published in said County, therein appointing a day, hour and place of sale, and upon such sale to execute to the purchaser a good and

sufficient deed to said land.

And the Trustee, after having retained out of the proceeds of such sale five per cent commission for making such sale, together with the costs of advertising, selling and reporting to the court shall apply the residue, so far as it may extend or may be necessary, to the payment of said note and all interest then accrued and any sums advanced by the Note Holder as herein provided, and shall pay the balance thereafter remaining, if any, to said Grantor, or other party entitled thereto, subject to the approval of the Bankruptcy Court.

If foreclosure is commenced but no sale is actually held, the Trustee shall receive such compensation for his services as may be allowed by order of the Clerk of the Superior Court, not exceeding the compensation for holding the sale as above provided.

FOURTH: It is further stipulated and agreed that any statement of facts or recital by said Trustee in his deed in relation to the non-payment of the money secured to

be paid, the amount due, the advertisement, sale, receipt of the money, and the execution of the deed to the purchaser shall be received as prima facie evidence of such fact.

FIFTH: The irrevocable power to appoint a substitute trustee or trustees is hereby expressly granted to the Note Holder, his successors or assigns, to be exercised at any time hereafter, without notice and without specifying any reason therefor, by filing for record in the office where this instrument is recorded an instrument of appointment. The Grantor, for itself, his or its heirs, executors, administrators, successors and assigns, and the Trustee herein named, or that may be substituted hereunder, expressly waive notice of the exercise of this power, and any necessity for making oath or giving bond by any trustee, as well as any requirement for application to any court for the removal, appointment or substitution of any trustee hereunder; and the Note Holder, his successors or assigns, may

elect to appoint a substitute trustee in accordance with the laws of North Carolina.

SIXTH: That when any reference is herein made to the Grantor or to the Trustee or to the Note Holder, or to the note hereby secured, the singular shall include the plural and the masculine shall include the feminine or the neuter.

THE GRANTOR DOTH HERE COVENANT AND AGREE that he is the owner in fee simple of the land herein conveyed, and has the right to convey the same; that the same is free and clear of all encumbrances except as herein stated; that he will forever warrant and defend the title herein conveyed against the lawful claims of all persons whomsoever; and that he will execute such further assurances as may be necessary or proper to carry out the true intent and purpose of this trust.

IN TESTIMONY WHEREOF, said Grantor has caused these presents to be signed in its corporate name by

its President, and its corporate seal to be hereunto affixed, and attested by its Secretary, by order of its Board of Directors duly made, the day and year first above written.

GOLDEN ENTERPRISES, INC.

By: /s/ Thomas D. Golden

President

Attest: /s/ Patricia G. Strong

Secretary

(Acknowledgment omitted in printing)

(Recorded in the office of the Register of Deeds of Catawba County at 8 a.m. on the 22nd day of July, 1974, in Book 1051, Page 184.)

(Certificate of Registration omitted in printing)

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

MONTHLY FINANCIAL REPORT

July, 1975

The undersigned Trustee submits the following report of receipts and disbursements in the month of July, 1975:

Cash Balance	$ 83,803.57
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Superior Continental (July rent)	5,540.62		
Superior Continental (July rent)	4,750.00		
C.I.T. Financial Services (July rent)	487.50		
Iron Gate Restaurant (July rent)	652.44		
Metelpel (July rent)	1,015.62		
Travel World (May rent)	325.00		
Frelon Broome Insurance (July rent)	350.00		
Capitol Credit (June rent)	350.00		
Capitol Credit (July rent)	350.00	$	17,636.09
Total Cash		$	101,439.66

Cash Disbursements:

Postmaster - P. O. Box rent	$ 10.00		
Cagle & Houck - Reimbursement for Trustee Bond	200.00		
City of Hickory - Utility bill under lease	6.53		
Split Second Printing - Printing Notice to Creditors	13.42		
City of Hickory - Utility bill under lease	16.00		
City of Hickory - Utility bill under lease	6.53		
City of Hickory - Utility bill under lease	6.53		
Central Telephone Co. - Utility bill under lease	6.00		
Duke Power Co. - Utility bill under lease	105.53		
Duke Power Co. - Utility bill under lease	58.82		
Duke Power Co. - Utility bill under lease	59.25		
City of Hickory - Utility bill under lease	6.53	$	495.14

Balance on Hand	$	100,944.52

*Rental payments for the month of June and July have not been received from Travel World.

*Of the Balance on Hand, $100,000.00 is deposited in a Passbook Savings Account at North Carolina National Bank.

This is to certify that the above represents a true and accurate record of the receipts and disbursements of the undersigned Trustee during the month of July, 1975, in the above-references estate.

/s/ Joe N. Cagle, Trustee

P. O. Box 2050

Hickory, NC 28601

COUNSEL:

469a

Joe N. Cagle, Attorney

CAGLE AND HOUCK

P. O. Box 2050

Hickory, NC 28601

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PROOF OF CLAIM FOR INTERNAL REVENUE TAXES

BANKRUPTCY ACT PROCEEDINGS

IN THE DISTRICT COURT

FOR THE WESTERN DISTRICT OF N. C.

(Caption omitted in printing)

CLAIM OF THE UNITED STATES

FOR INTERNAL REVENUE TAXES

AMENDMENT NO. 2

TAXPAYER'S IDENTIFYING NUMBER:

Social Security No. _____

Employer Identification No. 56-0929458

The undersigned officer of the Internal Revenue Service, a duly authorized agent of the United States in this behalf, declares that:

1. The debtor is justly and truly indebted to the United States in the sum of $50,388.28.

2. The said debt is for taxes due under the internal revenue laws of the United States as follows:

A. LIEN CLAIMS (Notice of Federal Tax Lien filed prior to Bankruptcy Petition date)

KIND OF TAX	PERIOD	AMOUNT DUE	REMARKS	DATE NOTICE OF TAX LIEN FILED	DATE TAX ASSESSED
WT-FICA	3-31-73	$39,390.90		5-21-73	5-21-73
Interest to 2/14/75		4,232.56			
FUTA	12-31-72	724.48		6-4-73	6-4-73
Interest to 2/14/75		255.08			
FUTA	12-31-73	5,445.80		6-26-73	6-26-73
Interest to 2/14/75		339.46			
		Total $50,388.28			

B. PRIORITY CLAIMS

KIND OF TAX	PERIOD
WT-FICA	3-31-73
Interest to 2/14/75	
FUTA	12-31-72
Interest to 2/14/75	
FUTA	12-31-73
Interest to 2/14/75	

C. UNSECURED CLAIMS

KIND OF TAX	PERIOD	AMOUNT DUE	REMARKS	DATE TAX ASSESSED

NOTE: This amends and replaces Proof of Claim filed February 4, 1974 as an Arrangement case, and reflects a decrease in tax liability due to credits being applied to the 12-31-72, 940 Account. Interest has been refigured and increased to the date taxpayer adjudicated to liquidating.

3. No part of said debt has been paid and it is now due and payable at the Office of the District Director of Internal Revenue;

4. There are no set-offs or counterclaims to said debt;

5. Except for the tax liens protected by notices of lien filed on the date above, the United States does not hold, to my knowledge or belief, any security or securities for said debt;

6. No note or other negotiable instrument has been received for said debt or any part thereof, nor has any judgment been rendered with respect to said debt; and

7. Said debt is to be paid to the extent provided by law. See sections 17, 64, 77e, 199, 337(2), 455, and 659 of the Bankruptcy Act (11 U.S.C. 35, 104, 205(c), 599, 737(2), 855, and 1059).

/s/ Albert Bunton

July 29, 1975

Chief, Special Procedures Staff

Post Office Box 20541

Greensboro, North Carolina 27420

UNITED STATES DISTRICT COURT-WESTERN DISTRICT OF NORTH CAROLINA-STATESVILLE DIVISION

(Caption omitted in printing)

APPLICATION FOR PROFESSIONAL SERVICES RENDERED AND EXPENSES INCURRED AS ATTORNEY FOR CREDITORS COMMITTEE DURING PENDENCY OF SUPERSEDED CHAPTER XI PROCEEDING

TO: THE HONORABLE JOSEPH R. CRUCIANI, BANKRUPTCY JUDGE

The application of ARTHUR I. WINARD respectfully represents:

1. That he is an attorney at law, admitted to practice in the highest courts of the State of New York, the United States District Courts for the Southern and Eastern Districts of New York, the Second and Fifth Circuit Courts of Appeal, the United States Supreme Court, and other Federal Courts, and submits this affidavit for an allowance for compensation for professional services rendered by applicant, and for reimbursement of actual and necessary costs and expenses incurred by applicant as one of the attorneys for the Creditors Committee during the pendency of the now superseded Chapter XI proceeding with respect to the above-named debtor.

2. This application covers services rendered solely by the undersigned from May 29, 1973 to the date of the signing of the Order adjudicating the above-named debtor a Bankrupt, and terminating the Chapter XI proceedings on February 14, 1975.

3. The above-named debtor filed a petition under Chapter XI of the Bankruptcy Act on May 4, 1973. On May 22, 1973, your applicant was advised of said filing by George Solow of J. Solow & Son, Ltd., a creditor of the debtor. On June 12, 1973, the official Creditors Committee was designated by this Court, and at that time the undersigned, Joseph H. Frier, Jr. of the firm of Goldman, Frier and Altesman,

Esqs., and J. Carroll Abernathy, Jr., Esq., were designated as attorneys for the Creditors Committee.

4. During the period of time in question, your applicant, as more specifically detailed in the schedules annexed hereto, worked with the debtor and its counsel, James M. Gaither, Jr., Esq. in every way requested by them and on behalf of the Creditors Committee, in an effort to resolve the debtor's financial problems and to formulate a plan of arrangement which would be in the best interest of the unsecured creditors as well as the debtor. In this regard, numerous conversations were had by your applicant with James M. Gaither, Jr., Esq., as counsel for the debtor, as well as with Thomas Golden, President of the above-named debtor, in an effort to ascertain the debtor's true financial picture, to determine the value of its assets and to determine which of debtor's assets might be sold in order to properly fund a plan of arrangement.

As set forth in the schedules submitted herewith, a number of conferences were held at applicant's office with Thomas Golden, as President of the debtor corporation, James H. Gaither, Jr., Esq., Joseph H. Frier, Jr., Esq. and Mr. George Solow, during which conferences debtor's complete financial status was reviewed and analyzed, proposals and recommendations were discussed and made with respect to additional financing of debtor, discussions were had with respect to restructuring the existing mortgages on debtor's real estate, and finally, discussions were had with respect to possible sale of certain of debtor's real estate in order to enable debtor to submit a plan of arrangement.

The services rendered by your applicant as attorney for the Creditors Committee, along with Messrs. Frier and Abernathy, resulted in a Plan of Arrangement actually being filed with this Court by the debtor and steps were taken in order to obtain the ratification of

said Plan. Thereafter, however, the debtor ascertained that it would be unable to obtain the necessary financing required if the said Plan of Arrangement was to be adopted, and debtor's counsel was required therefore to withdraw said Plan as shown in the schedule submitted herewith. Your applicant then fully cooperated with the debtor and its counsel, in their efforts to formulate an Amended Plan of Arrangement and as a result of your applicant's efforts, along with the efforts of Joseph H. Frier, Jr., a proposed Amended Plan of Arrangement was prepared by debtor's counsel. Once again, however, debtor was unable to obtain the financing necessary to put said Plan into effect.

Efforts by debtor's counsel, with whom your applicant fully cooperated, to restructure the mortgages on debtor's real estate, ultimately proved of no avail and after analysis of the values of debtor's real estate it was found that the equity in said real estate, over

and above the mortgages thereon, was insufficient to allow for the filing of the proposed Amended Plan of Arrangement. As a result of debtor's inability to submit a Plan of Arrangemen, this Court, on January 22, 1975, ordered the debtor to file an indemnity bond in the amount of $50,000 on or before February 5, 1975. On February 14, 1975, this Court ordered that bankruptcy in this matter be proceeded with based on the debtor having failed to file said bond.

5. In addition to the above services, your applicant, as one of the attorneys for the Creditors Committee, worked with the debtor and its counsel with respect to debtor's inventory which had been shipped from Los Angeles to debtor's premises in North Carolina. These services were instituted in view of the fact that Commercial Credit Corporation, a secured creditor, had a lien against debtor's inventory in North Carolina. Applicant advised debtor and its counsel that the lien of Commercial Credit Corporation

did not cover that part of debtor's inventory which had been transferred to North Carolina from Los Angeles. Thereafter, your applicant was advised that the Los Angeles inventory had initially been commingled with debtor's then existing inventory in North Carolina and your applicant further worked with the debtor and its counsel in an effort to segregate the Los Angeles inventory from the North Carolina inventory. Your applicant further cooperated both with debtor and its counsel and with Joseph H. Frier, Jr., Esq. in an effort to reach a settlement with Commercial Credit Corporation and other of debtor's secured creditors to enable creditor to submit a Plan of Arrangement.

6. Professional services for which compensation is requested by your applicant were necessarily performed as one of the attorneys for the Creditors Committee during the Chapter XI proceedings hearing, which said proceedings terminated by the signing of

the aforesaid Adjudication Order on February 14, 1975.

7. Annexed hereto and made a part hereof by specific reference are schedules taken from the time records of your applicant which are broken down into four categories: conferences, telephone calls, correspondence received and correspondence sent. The number of actual hours diaried by your applicant in connection with professional services rendered as one of the attorneys for the Creditors Committee during the superseded proceedings under Chapter XI of the Bankruptcy Act total 108 3/4 hours, as fully detailed in the schedules which are annexed hereto.

8. Your applicant has been a practicing attorney for thirty-one years. Applicant is co-author of New York Surrogate Practice, editor of Landmark Papers on Estate Planning, Wills, Estates and Trusts (3 volumes), Anti-Trust Law and Techniques (3 volumes), Organizing Corporate and Business Enterprises, New York Law of Mechanics' Liens, A Guide to Motion

Practice, New York State Rent Control, Lawyers' Accounting Handbook, and Rent Control -- Federal, State and Municipal, and former managing editor of The Practicing Law Institute. In addition, your applicant was one of the founders of the New York Bankruptcy Bar Association and a contributor to various legal periodicals. Applicant's gross fees received for professional services rendered in the practice of law for the year 1974 were $178,568.65, with his adjusted gross income being $106,662.44.

Applicant's normal charge for professional services rendered by him is at the rate of $150 per hour. On this basis, a reasonable attorney's fees to be paid to your applicant for services rendered herein during the now superseded proceedings under Chapter XI of the Bankruptcy Act is $16,312.

9. In connection with professional services rendered by applicant during the Chapter XI proceedings herein, applicant expended $46.76 as and for long

distance telephone calls to Thomas Golden, President of the debtor herein, James H. Gaither, Jr., Esq. and J. Carroll Abernathy, Esq., and in connection with the photostating of various documents received by this office. It is respectfully submitted that applicant is entitled to be reimbursed for said expenses.

Applicant, therefore, respectfully requests the sum of $16,312 for professional services rendered, plus $46.76 which represents actual incurred expenses, as aforesaid.

Dated: New York, New York

July 28, 1975

/s/ Arthur I. Winard, Applicant

Office & P. O. Address

475 Fifth Avenue

New York, N. Y. 10017

(212) LE 2-5800

STATE OF NEW YORK :

COUNTY OF NEW YORK : SS.:

ARTHUR I. WINARD, being duly sworn, deposes and says:

That he is the Applicant who has prepared and signed the foregoing Application for Professional Services Rendered and Expenses Incurred as Attorney for the Creditors Committee during pendency of superseded Chapter XI proceedings; that no agreement has been made, directly or indirectly, and no agreement or understanding exists for the division of the fee sought herein with the debtor, the attorney for the debtor, or any other attorney or party.

/s/ Arthur I. Winard

(Jurat omitted in printing)

GOLDEN ENTERPRISES, INC.-

Schedule of Conferences and Meetings

Date	With Whom and Subject
6/7/73	Meeting of unsecured creditors at this office with Thomas Golden representing debtor. Discussions held as to debtor's financial position, with balance sheets, profit and loss statements, and real estate holdings being reviewed 2 3/4 hrs.
6/14/73	Conference with George Solow, Joseph H. Frier, Jr., Esq. and Albert Altesman, Esq. Discussed debtor's financial situation and actions taken at first meeting of creditors held 6/12/73 1 1/2 hrs.
10/9/73	Meeting of Creditors Committee held at this office with Arthur I. Winard and Joseph H. Frier, Jr., Esq., as attorneys for Committee, and Thomas Golden and James Gaither, Esq. representing debtor. Discussed proposed

Plan of Arrangement; shipment of debtor's inventory from Los Angeles to North Carolina, debtor's cash flow and construction of debtor's proposed new building; discussed monies required to fund Plan. 2 1/2 hrs.

10/5/73 Conference with Frier at which proposed Plan of Arrangement was reviewed and changes and amendments thereto discussed 1 hr.

1/24/74 Conference with George Solow, Chairman of Creditors Committee and Thomas Golden, on behalf of debtor. Discussed lien of Commercial Credit against inventory and possible litigation against Commercial Credit; discussed debtor's cash flow, real estate holdings, present financial picture and possible steps to fund Plan 1 1/2 hrs.

3/29/74 Conference with George Solow, Chairman of Creditors Committee; discussions dealt with debtor's current financial position, monies

needed to fund Plan of Arrangement, offers made to purchase debtor's inventory and liens of Commercial Credit, Marine Midland and U.S. Telephone conversations as to these points were had with Frier and Golden during meeting 2 hrs.

5/15/74 Conference with Frier to discuss debtor's current financial status, status of Plan of Arrangement, means of funding Plan 1 hr.

6/12/74 Conference, this office, with George Solow, Chairman of Creditors Committee, Frier, Gaither, Thomas Golden and Joseph Golden. Discussed financial position of debtor, sale of debtor's real estate--Metelpel Building and Shopping Center--proposed Amended Plan of Arrangement and funding thereof 2 hrs.

10/3/74 Conference, this office, with George Solow, Thomas Golden, James Gaither, Esq. and Joseph H. Frier, Jr., Esq. Discussed pro-

posed Amended Plan of Arrangement and agreement reached to have debtor attempt sale of its shopping center and Metelpel Building to fund Plan of Arrangement 2 hrs.

Total number of hours devoted to conferences and meetings in connection with rendering services as co-counsel for Creditors Committee while debtor was in Chapter XI 16 1/4 hrs.

GOLDEN ENTERPRISES, INC. - TELEPHONE CALLS

Date	Time	With Whom	Subject
6/4/73	12:40 p.m.	Thomas Golden	Discussed creditors meeting in N.Y. for coming week
6/5/73	2:55 p.m.	Joseph H. Frier, Jr., Esq.	Discussed chapter XI filed by Golden Enterprises, Inc. and creditors reported by respective officer
6/6/73	10:10 a.m.	Thomas Golden	Advised can be in N.Y. for meeting with creditors on 6/7
	12:30 p.m.	Famas, Inc.	Told Creditors Meeting 6/7 - 10:30 a.m.
	12:35 p.m.	Nancsi Mfg. Corp.	Told Creditors Meeting 6/7 - 10:30 a.m.

	12:40 p.m.	Joseph H. Frier, Jr.	Told Creditors Meeting 6/7 - 10:30 a.m.
6/8/73	11:05 a.m.	Joseph H. Frier, Jr., Esq.	Discussed designation of J. Carroll Abernathy, Esq. as co-counsel for creditors Committee
6/12/73	12:00 Noon	Joseph H. Frier, Jr., Esq.	Albert Altesman, Esq. attending 1st Meeting of Creditors and will advise when he speaks to Altesman
	4:55 p.m.	Thomas Golden	Discussed events of 1st Meeting of Creditors and of his conversations with Altesman
	5:05 p.m.	George Solow	Advised of conversation with Golden

	5:10 p.m.	Joseph H. Frier, Jr. Esq.	Advised of conversation with Golden and Solow
6/13/73	11:15 a.m.	Joseph H. Frier, Jr. Esq.	Agreed to meeting with Solow this office on 6/14/74
6/19/73	1:10 p.m.	Albert Altesman, Esq.	He advised of conversation with James Gaither, Esq. concerning debtor's financial position and shipment of California inventory to North Carolina
6/20/73	11:10	Albert Altesman, Esq.	Asked for list of creditors; discussed possible refinancing of debtor

6/22/73 10:25 a.m.	Albert Altesman, Esq.	Requested he check with Gaither as to debtor refinancing, discussed debtor's financial position
6/25/73 9:50 a.m.	Joseph H. Frier, Jr. Esq.	Discussed conversations between Altesman & Abernathy concerning Hearing 6/27/73
6/25/73 4:20 p.m.	George Solow	Discussed conversation between Solow and Golden concerning debtor's refinancing
4:50 p.m.	James H. Gaither, Esq.	Discussed debtor's situation as to refinancing, cash flow and completion of building

9:00 p.m.	Thomas Golden	Full discussion of debtor's financial situation, per discussion with Gaither, discussed possible Chapter X and meeting in N.Y. with himself and Gaither
6/26/73 9:05 a.m.	George Solow	Advised of conversations with Gaither and Golden on 6/25/73
1:15 p.m.	George Solow	Advised of conversation he had with Golden concerning debtor's application to ship inventory from California to North Carolina and Comm. Credit Lien

	1:30 p.m.	Joseph H. Frier, Jr. Esq.	Advised of conversation with Solor (1:15 p.m.)
	6/27/73	George Solow	Advised of Golden call advising Solow appointed Chairman of Creditors Committee, this date, shipment of inventory from California approved
495a	6/28/73 10:30	Joseph H. Frier, Jr. Esq.	Advised of conversation with Solow as to Hearing held 6/27/73 and arranged conference call with Gaither
	3:50 p.m.	Albert Altesman, Esq. and Gaither (conference call	Discussed debtor's present financial situation, Commercial Credit lien on inventory vis-a-vis California inventory, completion of building proposals as to Plan of Arrangement
	7/2/73 9:50 a.m.	Albert Altesman, Esq.	He advised of letter from Abernathy and submission of order designating Creditors Committee
496a	7/16/73 1:50 p.m.	George Solow	Advised of letter from Abernathy as to debtor's financial position
	7/7/73 1:00 p.m.	George Solow	Discussed call to Solow from Gaither as to possible meeting of creditors in New York
	7/18/73 10:35 a.m.	Joseph H. Frier, Jr., Esq.	Advised of Solow conversation (7/17) and discussed status of Chapter XI

			and steps to have debtor submit Plan
7/19/73	1:00 p.m.	Joseph H. Frier, Jr., Esq.	Discussed debtor's request for meeting and decided meeting would not be called in New York at present
	1:25 p.m.	Thomas Golden	Discussed debtor's current financial position
7/20/73	12:45 p.m.	Joseph H. Frier, Jr., Esq.	Advised he spoke to Gaither who said Plan would be submitted in about 5 days
7/23/73	2:50 p.m.	Joseph H. Frier, Jr., Esq.	Agreed that would not meet with debtor until proposed Plan submitted
	3:00 p.m.	George Solow	Told of conversation with Frier as to

497a

			no meeting with debtor until proposed Plan received
7/31/73	10:25 a.m.	Joseph H. Frier, Jr., Esq.	Advised of meeting with Golden, Gaither and Solow at his office 7/27; Credit Committee meeting to be held this office 8/9; discussed proposals as to Plan to be submitted by debtor
9/10/73	9:55 a.m.	Joseph H. Frier, Jr., Esq.	Advised of conversation with Gaither as to submission of proposed Plan and Funding of same
9/13/73	1:00 p.m.	Joseph H. Frier, Jr., Esq.	Advised of conversation he had with Solow concerning letter to be sent to

498a

		creditors
10/3/73 10:40	Joseph H. Frier, Jr., Esq.	Discussed Plan and consents to confirmation received to date; advised Hearing scheduled for 10/10 and agreed to meet to discuss amendments to Plan
10/10/73 10:20 a.m.	Joseph H. Frier, Jr., Esq.	Discussed Amendment to Plan of Arrangement
10/23/73 11:50 a.m.	Joseph H. Frier, Jr., Esq.	Stated he would advise as to new date for confirmation Hearing
11/1/73 11:50 a.m.	Joseph H. Frier, Jr., Esq.	Advised Plan accepted; discussed preparation of petition for Allowance

		by 11/15/73
11/12/73 1:05 p.m.	Joseph H. Frier, Jr., Esq.	Discussed proposed agreement with Gaither re financing properties
11/26/73 2:50 p.m.	Joseph H. Frier, Jr., Esq.	Advised no new developments as to Golden Enterprises
12/24/73 11:00 a.m.	Joseph H. Frier, Jr., Esq.	Advised he has copy of Amended Plan but has withdrawn financing with respect to completion of new building
1/2/74 2:55 p.m.	Joseph H. Frier, Jr., Esq.	Advised of letter he is sending to Gaither concerning debtor's attempts to obtain new financing
1/23/74 10:50 a.m.	George Solow	He advised Golden wants to meet in

			N. Y. to discuss problem with Commercial Credit and their security interest
	5:25 a.m.	George Solow	Advised Golden here 1/24 in a.m.
1/24/74	10:10 a.m.	Joseph H. Frier, Jr., Esq.	Advised of meeting with Golden and Solow concerning Commercial Credit lien and debtor inventory
2/4/74	3:35 a.m.	Joseph H. Frier, Jr., Esq.	He advised of conversation with Gaither as to 3rd party takeover of 2nd mortgage and problems with Commercial Credit
2/6/74	11:40 a.m.	Joseph H. Frier, Jr., Esq.	Discussed 3rd party takeover of 2nd mortgage; advised Commercial Credit wants to close debtor's stores
	3:20 p.m.	Thomas Golden	Would agree to having liquidators come down to look over property; discussed Commercial Credit lien and he advised California inventory situation not resolved
	3:30 p.m.	Joseph H. Frier, Jr., Esq.	Advised him of conversation with Golden
2/7/74	10:30 a.m.	Gaither, Golden, Frier, Abernathy and Solow (Conference Call)	Discussed liens of Commercial Credit, Marine Midland and IDS; agreed to have inventory appraised, discussed

501a

502a

			additional monies - 3rd mortgage - to finance completion of building discussed commingling of California inventory and attempts to obtain advances from Commercial Credit
	11:05 a.m.	Joseph H. Frier, Jr., Esq.	Discussed matters reviewed in Conference Call and efforts to prevent a bankruptcy
	2/25/74 1:10 p.m.	George Solow	I was advised Golden was granted additional 60 days to keep inventory; offer made by Charles Camp to take over inventory for $250,000; Gaither

503a

			is to prepare new documentation for 2nd and 3rd mortgages
	1:15 p.m.	Joseph H. Frier, Jr., Esq.	Told of conversation with Solow. He will check with Abernathy as to present status
	3/18/74 9:00 a.m.	George Solow	Solow advised debtor had been granted 90 day extension to permit inspection of inventory discussed offers which Solow believes made on inventory; Solow said Golden understood inventory to be sold and debtor to retain real estate

504a

505a

3/19/74 1:05 p.m.	Joseph H. Frier, Jr., Esq.	Advised Frier of offers to purchase inventory; Frier attempting to negotiate settlement figure with Commercial Credit and will advise so that matter can be discussed with Creditors Committee
3/22/74 10:00 a.m.	Joseph H. Frier, Jr., Esq.	Still attempting to work out arrangement with Commercial Credit as well as with respect to offers on inventory
3/26/74 1:35 p.m.	George Solow	Set up appointment to discuss status of Golden Enterprises
3/28/74 4:40 p.m.	George Solow	Advised he was called by Golden and asked to have disbursement order signed. Said would discuss with him at conference tomorrow.

506a

3/29/74 12:30 p.m.	Joseph H. Frier, Jr., Esq.	Advised he was awaiting word from Commercial Credit concerning settlement and would advise
12:40 p.m.	Thomas Golden	With Solow present, discussed Commercial Credit situation; Golden stated he would sell his stock in corporation if needed; discussed monies needed to fund Plan
2:25 p.m.	Joseph H. Frier, Jr.,	He advised as to monies owed on lien

			of Commercial Credit, Marine Midland and H.S. and we discussed monies - $350,000 needed to fund Plan
4/1/74	11:45 a.m.	Thomas Golden	Advised he can get an offer on one of buildings to permit funding of Plan and allow interest 5% payout to unsecured creditor. Told Golden to get offer in writing
	11:50 a.m.	James H. Gaither, Esq.	Told of conversation with Golden; he said no offer yet; he advised as to conversation he had concerning sale of inventory with Gerden Bros.; he

507a

			requested return of signed documents pertaining to Shelby S & L Assoc. loan to complete building
	1:00 p.m.	Joseph H. Frier, Jr., Esq.	Advised of his conversations with Commercial Credit representatives trying to work out settlement; agreed not to make any arrangements as to debtor's real estate pending word from Commercial Credit
	2:15 p.m.	David Hutto III (Controller-Golden Ent.)	Required he forward written details of value of California inventory brought to North Carolina; value of North

508a

			Carolina inventory at that time; present inventory value so we could attempt to come up with value of remaining California inventory not subject to Commercial Credit lien
4/2/74	2:00 p.m.	Joseph H. Frier, Jr., Esq.	Still waiting word from Commercial Credit in settlement; Silverman will be in North Carolina 4/3/74 to see if he can come up with offer on inventory
4/8/74	10:00 a.m.	George Solow	Advised Gaither called him asking that Distribution Order be signed and returned

509a

	10:30 a.m.	Albert Altesman, Esq.	Told of Solow call. Frier away and I said I'd write Gaither concerning Distribution Order
	2:05 p.m.	George Solow	Advised Gaither had called again. Told him I would contact Gaither concerning Distribution Order
4/10/74	11:55 a.m.	George Solow	Advised of call from Gaither. Told him to tell Gaither meeting in N.Y. could be arranged once we had word from Commercial Credit as to settlement from Silverman as to interest in inventory

510a

	4:10 p.m.	Thomas Golden	Advised debtor could sell one building to fund Plan if needed.
	4/12/74 9:25 a.m.	George Solow	Gaither advised Solow he will be in New York on 4/16 to discuss current situation and preparation of Amended Plan
511a	4/15/74 11:40 a.m.	Joseph H. Frier, Jr., Esq.	Advised Silverman stated he was getting no cooperation from Gaither with respect to seeing debtor's inventory
	11:45 a.m.	George Solow	Advised him of conversation with Frier and stated we would discuss with Gaither when he was in New York

	3:25 p.m.	Thomas Golden	He advised Gaither not coming to New York on 4/16; told him we would put through conference call in morning with Abernathy, Frier, Solow and Gaither to discuss
512a	4/15/74 3:30 p.m.	Joseph H. Frier, Jr., Esq.	Advised of conversation with Golden and conference call in morning
	4/16/74 11:00 a.m.	Conference call with: Thomas Golden, George Solow, Joseph H. Frier, Jr., Esq. & J. Carroll Abernathy	Discussion as to funds needed to settle with secured creditors, pay court costs and have initial deposit for unsecured creditors. Discussed selling of inventory and one building.

513a

		Golden said he would obtain bids on inventory. Discussed completion of building. Agreed to ask Court for week's adjournment to come up with package deal.
12:35 p.m.	George Solow	Discussed conference call of earlier this date.
3:00 p.m.	Joseph H. Frier, Jr., Esq.	Advised he spoke with Silverman who will advise Referee at Hearing (4/17) additional time needed to check inventory. Also spoke with Gaither who agreed to solution discussed during

514a

		conference call.
4/18/74 2:40 p.m.	Joseph H. Frier, Jr., Esq.	Referee granted time to 4/22 for submission of proposals as to sale of inventory.
4/26/74 1:00 p.m.	Joseph H. Frier, Jr., Esq.	Frier stated Silverman had advised monies were deposited with court in connection with sale of inventory
5/13/74 10:55 a.m.	Joseph H. Frier, Jr., Esq.	Advised he told Abernathy we consent to sale of inventory to Silverman.
5/23/74 12:50 p.m.	Joseph H. Frier, Jr., Esq.	Advised him Solow not available to sign agreement re: Completion of New Building; discussed request to

		adjourn hearing scheduled for 5/19/74 pending Solow's return.
5/24/74 10:35 a.m.	Joseph H. Frier, Jr., Esq.	Discussed Amendment to Complaint in Proceedings to determine monies to be paid to secured creditors based on sale of inventory.
5/29/74 9:05 a.m.	George Solow	Delivered signed agreement re: Completion of new building to this office this morning.
10:30 a.m.	Joseph H. Frier, Jr., Esq.	Agreement re: completion of new building will be forwarded to him today for signature and forwarded to

		Gaither.
5/30/74 2:20 p.m.	Joseph H. Frier, Jr.,	Discussed allowance application.
6/7/74 10:15 a.m.	Joseph H. Frier, Jr., Esq.	Discussed meeting with Solow, Golden and Gaither to fully review situation.
6/10/74 10:40 a.m.	James Gaither	Discussed need for Amended Plan and need to sell 2 buildings, not 1, to fund same; he believes will have to qualify authorization to sell 1 building based on approval of Amended Plan to be submitted.
10:50 a.m.	George Solow	Advised of letter he received from Golden discussing present situation.

			Told him of conversation with Gaither.
	6/11/74	10:30 a.m.	Joseph H. Frier, Jr., Esq.	Advised Golden and Gaither will be in New York on 6/12 to meet with us and Solow at this office.
		10:35 a.m.	George Solow	Told of meeting with Frier, Golden and Gaither on 6/12 to discuss entire situation.
	6/28/74	3:20 p.m.	James Gaither	He said would forward duplicate of Agreement with Jack Sipe Construction Company re: completion of new building for signature.
		3:30 p.m.	Joseph H. Frier, Jr.,	Advised of conversation with Gaither.

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	7/1/74	3:05 p.m.	Joseph H. Frier, Jr., Esq.	Agreements being forwarded to Gaither per conversations on 6/28/74.
	7/15/74	11:30 a.m.	George Solow	Discussed letter from Golden reviewing current status of debtor and prospects.
	7/16/74	1:40 p.m.	Joseph H. Frier, Jr., Esq.	Discussed counsel fees. He will write to Bankruptcy Judge on this matter.
	8/20/74	12:15 p.m.	Joseh H. Frier, Jr., Esq.	Discussed present status of Chapter XI proceedings.
	9/3/74	12:10 p.m.	George Solow	Discussed letter from Golden as to possible means to Fund Plan and advised I was writing to Gaither with

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		respect to said letter asking him for his thoughts in the matter.
9/12/74 3:30 p.m.	Joseph H. Frier, Jr., Esq.	Advised of his conversation with Gaither concerning monies received by Gaither from Court advised Golden not willing to sell property yet. Discussed Gaither request for meeting in New York.
9/25/74 11:05 a.m.	Joseph H. Frier, Jr., Esq.	Agreed to hold meeting in New York with Golden and Gaither during week of September 30th.
9/30/74 9:50 a.m.	James Gaither	Discussed offer to purchase debtor's shopping center for $335,000. and Funding of Plan. Agreed to meet in New York prior to October 4th.
10/2/74 11:35 a.m.	George Solow	Discussed meeting with Golden and Gaither at this office on 10/3/74 and present status of debtor's financial position.
11:45 a.m.	Joseph H. Frier, Jr., Esq.	Confirmed meeting with Golden and Gaither for 10/3/74, this office.
3:00 p.m.	James Gaither	Confirmed meeting with himself and Golden for 10/3/74 this office.
11/7/74 11:00 a.m.	Joseph H. Frier, Jr.,	Discussed Gaither letter of 11/1/74

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		advising of developments since meeting of 10/3/74. He stated had discussed matter with Gaither.
11:55 a.m.	James Gaither	Advised he was filing Motion to continue date to file deposit with Court or, in alternative, to permit new Plan to be filed. Requested consent of creditors committee to this action.
11/27/74 2:20 p.m.	Joseph H. Frier, Jr., Esq.	Discussed present status of proceedings vis-a-vis Plan of Arrangement. Stated I had raised this matter in letter to Abernathy and was awaiting reply.

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12/2/64 2:15 p.m.	Joseph H. Frier, Jr., Esq.	Discussed present status of proceedings. He will discuss with Golden.
1/21/75 5:00 p.m.	James Gaither	Discussed Show Cause Order re: filing of bond by debtor to continue in Chapter XI or otherwise be adjudicated; discussed current status as to default on 2nd mortgage payments by debtor. Hearing set for 1/22/75, discussed filing of Chapter X Petition.
1/23/75 10:05 a.m.	James Gaither	Advised $50,000 indemnity bond required within 2 weeks to continue Chapter XI. Discussed feasibility of

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		Chapter X filing; discussed appraisal values on debtor's real estate current negative cash flow of debtor.
1/30/75 1:45 p.m.	James Gaither	Discussed debtor's cash flow problem and possibility of obtaining additional time on mortgage payments; requested he forward copies of appraisals to see if situation can be salvaged.
2/11/75 10:20 a.m.	George Solow	Discussed present status and financial position of debtor and as to possibility of preventing total loss to unsecured creditors.

Note: Debtor Adjudicated Bankrupt by Order dated February 14, 1975

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GOLDEN ENTERPRISES, INC. - CORRESPONDENCE RECEIVED

Date	From Whom	Subject
6/11/73	Aurora Products Corp.	Enclosing Proof of Claim and power of attorney to be filed with Bankruptcy Court
6/11/73	Lumin Jewelry Company, Inc.	Authorizing representation in Chapter XI proceeding by Winard
6/18/73	Olumpic International Ltd.	Enclosing executed Proof of Claim for filing
6/20/73	Albert Altesman, Esq.	Enclosing copy of letter to J. Carroll Abernathy, Esq. advising of meeting of creditors in New York and discussing counsel arrangements.
6/20/73	Albert Altesman, Esq.	Enclosing copy of letter to Abernathy forward-

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		ing proofs of claim and discussing election of Creditors Committee
7/16/73	J. Carroll Abernathy, Jr., Esq.	Copy of letter to Altesman, discussing financial position of debtor vis-a-vis financing building
7/19/73	J. Carroll Abernathy, Jr., Esq.	Enclosing Order appointing Creditors Committee
7/23/73	Joseph H. Frier, Jr., Esq.	Copy of letter to James Gaither, Esq., attorney for debtor, advising of creditor's meeting 8/15/73 at office of Arthur I. Winard
8/7/73	Joseph H. Frier, Jr., Esq.	Enclosing Order with regard to Official Creditors Committee

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8/17/73	James M. Gaither, Esq.	Enclosing Application and Order for extension of time for filing Plan of Arrangement
8/20/73	Albert Altesman, Esq.	Copy of letter to Gaither requesting information as to present financial status and preparation of Plan of Arrangement
8/21/73	Olympic International Ltd.	Inquiring as to present status of Chapter XI proceedings
9/17/73	Joseph H. Frier, Jr., Esq.	Copy of letter to Fairley, Hamrick, Monteither & Coss, Esqs. as to their motion to establish security interest on debtor's inventory returned from California. Requesting motion be adjourned pending adoption of Plan

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9/19/73	George I. Cohen, Esq.	Enclosing Proof of Claim and Consent to Plan on behalf of S.R.S. Jewelry Casting Corp.
9/19/73	Mendenhall's	Requesting that Proof of Claim be filed on their behalf; enclosing invoices and statement
10/4/73	Joseph H. Frier, Jr., Esq.	Copy of letter to James Gaither enclosing Consents received to date
10/5/73	J. Carroll Abernathy,	Advising Confirmation Hearing set for 10/10/73
10/10/73	Joseph H. Frier, Jr., Esq.	Copy of letter to James Gaither, Esq. outlining amendments to Plan of Arrangement drawn up by Frier and Winard
10/23/73	Collier, Harris & Homisky, Esqs.	Enclosing Consent to Plan on behalf of Top Brands, Inc. [Consent sent to Frier] and requesting further communications to them as attorneys for creditor Top Brands
11/5/73	Joseph H. Frier, Jr., Esq.	Enclosing copy of letter from J. Carroll Abernathy, Esq., advising as to Hearing 10/25/73; dates to file Allowance Application and discussing financing of Plan
11/15/73	Joseph H. Frier, Jr., Esq.	Copy of letter to Abernathy enclosing Frier-Winard Allowance Application for submission Copy of letter to Gaither enclosing executed copy of Agreement with First-Citizens Bank & Trust Co. as to financing
11/21/73	J. Carroll Abernathy,	Advising of current status of Proceedings and

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	Esq.	of plan to complete debtor's building
12/3/73	J. Carroll Abernathy, Jr. Esq.	Advising Amendment Plan of Arrangement to be filed within one week; advising as to financing problems of debtor and attempts by debtor to obtain tenant for building
12/13/73	J. Carroll Abernathy, Jr., Esq.	Advising that First-Citizens Bank & Trust will make no further loans to debtor and advising of discussions with Gaither as to debtor's attempts to complete building and salvage Plan of Arrangement
12/21/73	J. Carroll Abernathy, Jr., Esq.	Advising Amended Plan received from Gaither. Inquiring as to whether copy received by

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		Winard and Frier
1/3/74	Joseph H. Frier, Jr., Esq.	Enclosing Amended Plan of Arrangement
1/3/74	Joseph H. Frier, Jr., Esq.	Copy of letter to Gaither inquiring as to whether debtor can obtain other financing and recommending adjudication if financing not available
1/21/74	James M. Gaither, Esq.	Enclosing copy of Motion for Extension of Time for Confirmation of Plan or for filing of Chapter X Petition, advising of extension to 2/14/74 and as to arrangements by debtor to complete building.
3/8/74	J. Carroll Abernathy, Jr., Esq.	Advising of suggestion of Bankruptcy Judge Cruciani as to submission of Order designating

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		attorneys for Creditors Commission
3/14/74	James M. Gaither, Esq.	Requesting this office prepare proposed Order designating attorneys for Creditors Committee
3/22/74	Golden Enterprises, Inc. (David A. Hutto III, Controller)	Advising of bids of 3rd parties to turn over debtor's retail stores and requesting Winard and Frier advise as to monies needed to settle with secured creditors and to pay taxes, court costs, etc.
3/28/74	J. Carroll Abernathy, Jr., Esq.	Reply to Winard letter of 3/18/74; discussing debtor's current financial situation, prospects of financing Plan and suggesting conference call with Frier and Gaither to fully discuss

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		situation, including possible adjudication
4/4/74	Golden Enterprises, Inc. (David A. Hutto III, Controller)	Forward breakdown of debtor's inventory as of 1/31/73 and 4/30/73 with breakdown of sales for period May-Dec., 1973 on month-by-month store-by-store basis per request of Winard.
4/8/74	Thomas Golden	Copy of letter sent to Gaither discussing debtor's current financial situation, Commercial Credit position and lien and possible funding of Plan of Arrangement
4/9/74	Joseph H. Frier, Jr., Esq.	Copy of letter to Gaither as to 3rd parties interested in possible financing of debtor and

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		advising no distribution order will be signed until it is known whether Plan can be confirmed and funded.
4/15/74	Thomas Golden	Setting forth his views as to steps needed to fund Plan including views as to liquidation of stores, refinancing and development of debtor's real estate
4/24/74	J. Carroll Abernathy, Jr. Esq.	Advising as to Hearing held 4/17, Order of Bankruptcy Judge as to Confirmation Hearing, appointment of attorneys for Credit Commission and funding of Plan
5/10/74	J. Carroll Abernathy, Jr., Esq.	Discussing Allowance Application and Hearing 5/29/74 with respect thereto
5/15/74	Joseph H. Frier, Jr., Esq.	Forwarding copies of letters from Gaither with respect to debtor's financing through Shelby Savings & Loan Association and Certificate of title as to debtor's real estate
5/23/74	James M. Gaither, Esq.	Enclosing Agreement between Creditors Committee - William E. Butner, Robert L. McKaughn, Jr. and Jack Sipe Construction Co. for signature by Chairman of Creditors Committee and attorneys for committee.
6/10/74	George Solow	Forwarding letters received from Thomas Golden setting forth debtor's financial position,

		proposals as to funding of Plan and projected balance sheet and requesting comment thereon for discussion with Golden
6/19/74	Joseph H. Frier, Jr., Esq.	Copy of letter to Abernathy advising of meeting held 6/12/74 in N.Y. with debtor and counsel
6/24/74	J. Carroll Abernathy, Jr.,	Advising of Hearing held 6/14/74 and discussion with Silver as to Petition for Counsel Fees and claims - secured and unsecured - of Marine Midland
7/1/74	James M. Gaither, Esq.	Enclosing Agreement between Creditors Committee and Jack Sipe Construction Co. etc. for signature by Winard, Frier and Solow

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7/16/74	James M. Gaither, Esq.	Enclosing copy of letter from Golden advising as to debtor's present situation. Requesting Winard comments
7/29/74	James M. Gaither, Esq.	Copy of letter to Shelby Savings and Loan Association concerning construction and leasing of debtor's building
8/20/74	James M. Gaither, Esq.	Advising of leasing of debtor's building, monies received on sale of inventory and suggesting meeting to discuss submission of Plan
9/3/74	Thomas Golden	Discussing proposals to fund Plan and advising of debtor's current financial situation
9/27/74	Thomas Golden	Discussing steps required to Fund Plan and

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		possible sale of shopping center owned by debtor to Superior Continental Corp.
10/3/74	Thomas Golden	Advising of attempt to sell shopping center and discussing funding of Plan
10/15/74	James M. Gaither, Esq.	Copy of status report of Golden Enterprises, Inc. filed 10/8/74 with Hon. Joseph Cruciano, Bankruptcy judge
10/21/74	James M. Gaither, Esq.	Enclosing letters to Superior Continental Corp. concerning leases to Superior of Metelpel Building State Road property and Tate Boulevard property
10/21/74	J. Carroll Abernathy, Jr., Esq.	Copy of letter to Gaither discussing proposals to fund Plan and status thereof and discussing status of proceedings in Chapter XI
11/4/74	James M. Gaither, Esq.	Advising of efforts to sell Metelpel Building, debtor's cash flow problems, proposals to Fund and possible conversion of Chapter XI to Chapter X
11/6/74	James M. Gaither, Esq.	Enclosing description of lease agreements for property owned and leased by debtor, statement of debtor's monthly income from leases, description of mortgages on debtor's property
11/12/74	Thomas Golden	Advising of debtor's financial situation
11/15/74	Robert W. Adams, Esq.	Advising North Carolina National Bank holdings

	(Council to North Carolina National Bank)	1000 shares of debtors stock as security on loan to Thomas Golden inquiring as to possible redemption of stock by Creditors Committee
11/25/74	Thomas Golden	Advising of financial position of debtor
12/5/74	J. Carroll Abernathy, Jr., Esq.	Advising that no action be taken to redeem debtor's stock held by North Carolina National Bank
12/13/74	J. Carroll Abernathy, Jr., Esq.	Report of Hearing held 12/5/74 and debtor's current financial position
1/6/75	James M. Gaither, Esq.	Full status report of debtor, summary of debtor's cash position and of attempts to fund Plan

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1/15/75	J. Carroll Abernathy, Jr., Esq.	Commentary on Gaither letter and report received 1/6/75, and prospects as to continuing in Chapter XI or adjudication of debtor
1/25/75	James M. Gaither, Esq.	Copy of letter to Thomas Golden discussing debtor's current position and possible filing of Chapter X petition
2/3/75	James M. Gaither, Esq.	Enclosing appraisals of debtor's properties and discussing same. Discussing possible Chapter X proceedings and requirement of debtor to file indemnity bond to continue in Chapter XI
3/3/75	James M. Gaither, Esq.	Advising of appointment of Joe Cagle as

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		Operating Trustee of debtor in Bankruptcy; inquiring as to offer to purchase debtor's property
3/10/75	J. Carroll Abernathy, Jr., Esq.	Enclosing copy of Adjudication Order discussing present financial position of debtor and opinion as to no distributions to unsecured creditors

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GOLDEN ENTERPRISES, INC. - CORRESPONDENCE SENT

Date	To Whom	Subject
5/29/73	J. Solow & Son	Inquiry as to whether they had spoken with James Gaither, Esq., attorney for Golden Enterprises, Inc.
6/1/73	J. Solow & Son	Enclosing copy of memoranda of conversation with Thomas Golden as to financial situation of Golden Enterprises, Inc.
6/8/73	Joseph H. Frier, Jr., Esq.	Confirming Frier to attend 1st meeting of Creditors (6/12/73) and advising Proofs of Claim to be filed.
6/11/73	Joseph H. Frier, Jr., Esq.	Enclosing Proofs of Claim (8) to be filed in

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6/11/73	Lumin Jewelry Company, Inc.	Enclosing Proofs of Claim to be executed and returned for filing.
6/11/73	Olympic International Ltd.	Enclosing Proofs of Claim to be executed and returned for filing
6/13/73	Joseph H. Frier, Jr., Esq.	Requesting copies of all claims filed by his office on 6/12/73
6/18/73	Joseph H. Frier, Jr., Esq.	Enclosing Proofs of Claim (2) for filing with Bankruptcy Court
6/29/73	George Solow	Enclosing memoranda of conversation with Altesman and Gaither as to financial of building, creditors committee and additional merchandise to debtor
7/6/73	J. Carroll Abernathy, Jr., Esq.	Advising of conversation with Gaither, requesting copies of Orders appointing Creditors Committee and concerning debtor's Los Angeles inventory
7/19/73	Albert Altesman, Esq.	Discussing proposed creditors meeting and advising of conversation with Chairman of Creditors Committee
7/18/73	George Solow	Advising of conversation with Frier and demand to be made of debtor and counsel for submission of Plan.
8/2/73	Joseph H. Frier, Jr., Esq.	Requesting copies of documents delivered by

		James Gaither, Esq. at meeting in 7/27/73
8/7/73	Joseph H. Frier, Jr., Esq.	Discussing preparation of Notice as to retaining of counsel by Creditors Committee
8/15/73	Albert Altesman, Esq.	Advising of conversation with Thomas Golden and James Gaither as to Chapter XI Plan and preparation thereat
8/17/73	Joseph H. Frier, Jr., Esq.	Enclosing copy of debtor's application to extend time to file Plan
9/7/73	Joseph H. Frier, Jr., Esq.	Inquiring as to whether Frier has heard from debtor with respect to Plan of Arrangement
	Olympic International, Ltd.	Acknowledging filing of Proof of Debt on behalf of Olympic

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9/12/73	All Creditors (Joint letter with Goldman, Frier and Altesman, Esqs.)	Advising of present status of Chapter XI and Plan of Arrangement; discussing Plan and recommending adoption.
9/19/73	Mendenhall's	Enclosing Proof of Claim for signature to be returned for filing
9/24/73	Joseph H. Frier, Jr., Esq.	Requesting he forward proposed changes to Plan of Arrangement
9/28/73	Joseph H. Frier, Jr., Esq.	Inquiry as to adjourned date of confirmation hearing and requesting proposed changes to Plan of Arrangement
10/2/73	Joseph H. Frier, Jr., Esq.	Requesting response to letter sent 9/28/73 (supra)

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10/3/73	Joseph H. Frier, Jr., Esq.	Forwarding Consents to Plan received.
10/15/73	Joseph H. Frier, Jr., Esq.	Inquiring as to whether he has received report on Confirmation Hearing
10/24/73	James M. Gaither, Esq.	Inquiring as to adjourned date of Confirmation Hearing and present status of proceedings
11/2/73	Joseph H. Frier, Jr., Esq.	Discussing Allowance Application
11/6/73	Joseph H. Frier, Jr., Esq.	Discussing letter from J. Carroll Abernathy (copy received 11/5/73) and financing of Plan and completion of debtor's building
11/12/73	Joseph H. Frier, Jr., Esq.	Returning signed copies of Petition for Allowances, requesting conformed copy when signed by all parties.

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11/20/73	Joseph H. Frier, Jr., Esq.	Inquiring as to Hearing held 11/19/73
11/21/73	Joseph H. Frier, Jr., Esq.	Requesting he contact Gaither to verify submission of Amended Plan for approval 11/14/73
11/26/73	Joseph H. Frier, Jr., Esq.	Enclosing additional Consent to Plan of Arrangement received by this office.
11/27/73	J. Carroll Abernathy, Esq.	Inquiring as to current status of Proceedings, Filing of Amended Plan, and financing of building by debtor
12/3/73	Joseph H. Frier, Jr., Esq.	Requesting he discuss debtor's present financial problems with James Gaither, Esq.
12/12/73	J. Carroll Abernathy, Esq.	Inquiring as to further developments since letter received 12/3/73

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1/16/74	James M. Gaither, Esq.	Recommending consent to adjudication if debtor cannot obtain financing for building
1/21/74	James M. Gaither, Esq.	Requesting immediate notification once debtor decides whether to continue in Chapter XI or file Chapter X Petition
1/24/74	Joseph H. Frier, Jr., Esq.	Advising of meeting had with Thomas Golden this date and discussion as to present financial status of debtor and attempts to obtain financing.
2/5/74	Thomas Golden	Advising of conversation with Frier concerning debtor's financial situation, suggesting conference call with Winard and Frier to discuss same.
2/8/74	Hon. Joseph P. Cruciani	Joint Winard-Frier letter advising of conference with debtor's counsel and requesting 60 day extension to attempt to locate 3rd party to purchase debtor's inventory or operate debtor's retail outlets
2/21/74	Joseph H. Frier, Jr., Esq.	Discussing possible termination of Chapter XI and adjudication of debtor
2/25/74	Joseph H. Frier, Jr., Esq.	Advising of conversation with George Solow as to granting of 60 day extension and conversation between Golden & Solow as to 3rd party offer to purchase inventory

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3/8/74	James M. Gaither, Esq.	Inquiring as to status of offer to purchase debtor's inventory and as to debtor's financial picture
3/14/74	Joseph H. Frier, Jr., Esq.	Enclosing letter from Gaither received this date and discussing status of proceedings
3/18/74	J. Carroll Abernathy, Esq.	Advising of discussions with George Solow concerning offers for debtor's inventory; discussing preparation of proposed Order designating Counsel for Creditors Commission and inquiring as to debtor's attempts to obtain refinancing
3/22/74	Joseph H. Frier, Jr., Esq.	Enclosing letter from debtor received this date and requesting report as to meeting with Commercial Credit representatives concerning their lien.
3/28/74	Joseph H. Frier, Jr., Esq.	Suggesting conference call be put through between Winard-Frier-Abernathy and Gaither after meeting with Commercial Credit representatives
4/4/74	Joseph H. Frier, Jr., Esq.	Forwarding inventory figures received this date from debtor for discussion with Commercial Credit representatives in seeking a reduction of their lien
4/8/74	James M. Gaither, Esq.	Discussing present status of Proceedings and

		requesting submission of proposals with respect to Plan.
4/10/74	Joseph H. Frier, Jr., Esq.	Advising of conversations with George Solow and Thomas Golden as to funding of Plan and possible meeting with debtor and counsel to discuss same.
4/12/74	Joseph H. Frier, Jr., Esq.	Advising that Solow was told Gaither coming to N. Y. for meeting and of conversation with Solow as to debtor's submission of Plan
4/24/74	Joseph H. Frier, Jr., Esq.	Inquiring as to whether he has been advised by debtor as to bids on inventory. Discussing Allowance application

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5/15/74	George Solow	Advising of discussions with Frier as to Plan of Arrangement; enclosing proposed disbursement order for signature and proposed Agreement to complete debtor's building under construction
5/15/74	James M. Gaither, Esq.	Forwarding signed disbursement order and Agreement with respect to completion of debtor's building
5/24/74	James M. Gaither, Esq.	Advising George Solow out of country and Agreement with Jack Sipe Construction Co. cannot be signed and requesting adjournment of Hearing for one week as to approval of

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		Agreement
5/29/74	Joseph H. Frier, Jr., Esq.	Forwarding Agreement with Jack Sipe Construction Co. for signature and transmittal to Gaither
6/10/74	Joseph H. Frier, Jr., Esq.	Advising of conversations with Gaither and Golden as to possible funding of Plan
8/12/74	James M. Gaither, Esq.	Inquiring as to status of Plan of Arrangement and preparation of same
8/20/74	James M. Gaither, Esq.	Requesting status report as of 8/31/74 and meeting thereafter to discuss steps to submit and confirm Plan
8/29/74	James M. Gaither, Esq.	Requesting specific information as to proposed sale of real estate, completion of building, payment of taxes
9/3/74	James M. Gaither, Esq.	Requesting comment on Golden letter received this date for discussion with Frier and Solow
9/27/74	Thomas Golden	In answer to Golden letter received this date recommending attempts to resolve sale of shopping center
10/3/74	J. Carroll Abernathy, Esq.	Reporting as to meeting this date with Golden, Gaither, Frier and Solow as to sale of shopping center, Metelpel Bldg. and funding of Plan

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10/10/74	James M. Gaither, Esq.	Requesting report as to developments since meeting of 10/3/74
11/19/74	Robert W. Adams, Esq.	In response to letter received from Adams on 11/15/74, advising matter will be taken up re redemption of stock
11/22/74	J. Carroll Abernathy, Esq.	Forwarding copy of Adams letter received 11/15/74 for discussion with Gaither and recommendation as to response
11/25/74	J. Carroll Abernathy, Esq.	Forwarding letter received this date from Thomas Golden and requesting he confer with Gaither as to prospects for submission of Plan
12/31/74	James M. Gaither, Esq.	Forwarding copy of letter and report received

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		from Abernathy this date and requesting comments thereon
1/6/75	J. Carroll Abernathy, Esq.	Requesting comments on Gaither letter and report received this date and suggesting discussion with Golden as to possible adjudication
1/15/75	Joseph H. Frier, Jr., Esq.	Discussing Abernathy letter received this date.
1/20/75	James M. Gaither, Esq.	Requesting report on meeting of secured creditors held 1/20/75
1/30/75	James M. Gaither, Esq.	Requesting copies of petition to convert to Chapter X, and appraisals on debtor's real estate. Discussing debtor's cash flow problem.

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2/3/75	James M. Gaither, Esq.	Requesting copies of prior appraisals; information as to restructure of 1st mortgage loan terms, description of properties with respect to obtaining possible offer for debtor's properties
2/6/75	George Solow	Forwarding copy of Gaither letter received 2/3/75, discussing weakness of present tenancies and opinion that matter cannot be salvaged
2/18/75	James M. Gaither, Esq.	Requesting report on Hearing held 2/5/75
2/18/75	J. Carroll Abernathy, Esq.	Requesting report as to debtor's present status for discussion with Creditors Committee
2/28/75	Joseph H. Frier, Jr., Esq.	Inquiring as to discussions with Abernathy and as to possible dividends to unsecured creditors

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Re: GOLDEN ENTERPRISES, INC.

Schedule of Time Devoted in Rendering Professional Services as Co-Counsel to Creditors Committee

With Whom and Subject	Time
Conferences and meeting with Creditors Committee, representatives and counsel for debtor, co-counsel for Creditors Committee and unsecured creditors	16 1/4 hrs.
Telephone calls	15 hrs.
Review of correspondence received	19 hrs.
Correspondence sent by this office--time devoted to preparation thereof	18 1/2 hrs.
Analysis of Plan of Arrangement, Amended Plan of Arrangement, debtor's financial statements, debtor's profit and loss statements, agreement by	

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and between William E. Burton and Robert L. McKaughn, Jr. and Jack Sipe Construction Company (2nd mortgage holder) and Creditors Committee of Golden Enterprises, analysis of appraisals of debtor's real estate, review of application to court and court orders	40 hrs.
Total	108 3/4 hrs.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

BANKRUPTCY NO. ST-B-73-6

JOE N. CAGLE, Trustee in Bankruptcy for Golden Enterprises, Inc., Plaintiff, vs. SHELBY SAVINGS & LOAN ASSOCIATION, et al.

ORDER CONFIRMING SALE

THIS CAUSE coming on to be heard and being heard before the undersigned U.S. Bankruptcy Judge in chambers on July 29, 1975, upon motion of Joe N. Cagle, Trustee, for confirmation of the sale of the real estate of Golden Enterprises, Inc., and after review and consideration of the pleadings, the appraisals on file and other evidence, including arguments of counsel, and due deliberation being had thereon, the Court hereby enters its findings and order as follows:

1. That the Court heretofore entered an Order on June 30, 1975, authorizing the Trustee to sell the real

estate of the Bankrupt at public auction on July 28, 1975. The Trustee properly advertised the Bankruptcy Sale in accordance with the Rules of Bankruptcy and the Order of this Court. The sale was held by the Trustee on July 28, 1975, and it was regular and proper in all respects.

2. At said sale, the Trustee sold the real estate of the Bankrupt to the highest bidders, as follows:

TRACT I: Warehouse and office located at 1516 F Avenue, S.E., Hickory, North Carolina (known as Metelpel Products Building). This real estate is more particularly described in Deed Book 927 at Page 208, in the Office of the Register of Deeds for Catawba County. This property is also reflected in Catawba County Tax Map 60H--Block 4--Lot 26.

Mercer Simmons, MAI, Appraisal-December 5, 1974-$110,000.00

Reule Investment Company, Appraisal-January 21,

1975-$98,766.09

1975 Catawba County Tax Revaluation-$104,950.00

This real estate was sold subject to a first Deed of Trust to James M. Gaither, Jr., in favor of The First National Bank of Catawba County, dated Februarey 19, 1971, in the original amount of $74,000.00, recorded in Deed Book 967 at Page 160, in the Office of the Register of Deeds for Catawba County, and the current year's property taxes.

First Deed of Trust balance: $53,385.98

Highest bid above first Deed of Trust balance: $43,500.00

Highest bidder: Bowman Investment Company

TRACT II: Real estate known as Office Complex or Shopping Center located on Fourth Street Drive, S. W., Hickory, North Carolina. This real estate is more particularly described in Deed Book 986 at Page 421 in the Office of the Register of Deeds for Catawba County. This property is also reflected

in Catawba County Tax Map 43H-Block10-Lot 36B.

Mercer Simmons, MAI, Appraisal-December 5, 1974-$250,000.00

Reule Investment Company, Appraisal-January 21, 1975--$256,077.93

1975 Catawba County Tax Revaluation-$253,710.00

This real estate was sold subject to a first Deed of Trust to Lee Dennis, Trustee in favor of Fidelity Federal Savings and Loan Association, dated August 11, 1972, in the original amount of $200,000.00, recorded in Deed Book 1005 at Page 495, in the Office of the Register of Deeds for Catawba County, and the current year's property taxes.

First Deed of Trust balance: $180,541.75

Highest bid above first Deed of Trust balance: $28,000.00

Highest bidder: Angelo J. Emanuel

TRACT III: Real estate on Little Street, S. E. (231 Ninth Street Lane, S. E.), Hickory, North Carolina.

This real estate is more particularly described in Deed Book 947 at Page 415 in the Office of the Register of Deeds for Catawba County. This property is also reflected in Catawba County Tax Map 59H--Block 1--Lot 3.

Mercer Simmons, MAI, Appraisal-December 5, 1974-$360,000.00

Reule Investment Company, Appraisal-January 21, 1975-$336,257.87

1975 Catawba County Tax Revaluation-$290,240.00

This real estate was sold subject to a first Deed of Trust to Joseph C. Whisnant, Trustee in favor of Shelby Savings and Loan Association, dated Februarey 11, 1971, in the original amount of $260,000.00 recorded in Deed Book 967 at Page 28, in the Office of the Register of Deeds for Catawba County, and the current year's property taxes.

First Deed of Trust balance: $233,419.59

Highest bid above First Deed of Trust balance:

$75,000.00

Highest bidder: D. W. Bumgarner

TRACT IV: Real estate located at 1120 Tate Boulevard, Hickory, North Carolina, consisting of a 16 acre tract of land and 95,000 square foot industrial facility. This real estate is more particularly described in Deed Book 990 at Page 629 in the Office of the Register of Deeds for Catawba County. This property is also reflected in Catawba County Tax Map 60H--Block 1--Lot 11.

Mercer Simmons, MAI Appraisal-December 5,1974-$943,000.00

Reule Investment Company, Appraisal-January 21, 1975-$799,384.04

1975 Catawba County Tax Revaluation-$599,310.00

The major portion of this real estate was sold subject to a first Deed of Trust to Joseph C. Whisnant, Trustee in favor of Shelby Savings and Loan Association, dated April 2, 1973, in the original amount of $755,000.00,

recorded in Deed Book 1020 at Page 660 in the Office of the Register of Deeds for Catawba County, and the current year's property taxes.

First Deed of Trust balance: $7-9,310.55

Highest bid above first Deed of Trust balance: $100.00

Highest bidder: Shelby Savings and Loan Association

3. The Lessees of the above tracts of real estate were not made parties to the adversary proceedings giving rise to the Bankruptcy Sale, and the Trustee sold the real estate subject to the rights of tenants in possession, as well as to the first Deeds of Trust and current year's taxes.

4. The bids for Tracts I and III appear to be the highest and best bids obtainable, while the bids for Tracts II and IV are low. The Trustee has indicated that he can sell these two tracts at private sale for higher amounts than he received at the public auction.

5. The beneficiaries of the outstanding second Deed of Trust objected to confirmation of the Bankruptcy

Sale in its entirety. Further, the beneficiaries of said second Deed of Trust requested the Court to authorize and direct the Trustee to abandon and convey the said real estate directly to the beneficiaries of the said second Deed of Trust.

NOW, THEREFORE, IT IS ORDERED AND DECREED as follows:

1. The request of the beneficiaries of the second Deed of Trust for the Trustee to abandon and convey the said real estate directly to the beneficiaries of the said second Deed of Trust is denied.

2. The sale of Tracts II and IV are not confirmed and the Trustee is hereby authorized and directed to negotiate for and receive offers for the sale of said tracts at private sale, subject to further orders of this Court.

3. The sale of Tract I to Bowman Investment Company for $43,500.00 be and it is hereby confirmed and the Trustee is hereby authorized and directed to convey the said Tract I to Bowman Investment Company subject

only to easements for streets and public utilities, rights of tenants in possession, and the outstanding first Deed of Trust in favor of The First National Bank of Catawba County and the current year's ad valorem taxes.

4. The sale of Tract III to D. W. Bumgarner for $75,000.00 be and it is hereby confirmed and the Trustee is hereby authorized and directed to convey the said Tract III to D. W. Bumgarner subject only to easements for streets and public utilities, rights of tenants in possession, and the outstanding first Deed of Trust in favor of Shelby Savings and Loan Association and the current year's ad valorem taxes.

5. The rights and interests of the Employment Security Commission of North Carolina and William E. Butner, Robert L. McKaughn, Jr., and Jack Sipe Construction Co., beneficiaries of the outstanding second Deed of Trust on the real estate of the Bankrupt, be and they are hereby transferred to the proceeds of the aforesaid

sales, with the validity, priority and amounts of said liens to be determined by subsequent order of this Court.

6. The costs of this proceeding, including all costs incidental to the sale of said real estate are hereby charged as a part of the costs of administration.

This the 4th day of August, 1975.

/s/ Joseph R. Cruciani

U. S. Bankruptcy Judge

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

PETITION FOR ATTORNEY'S FEES FOR

J. CARROLL ABERNETHY, JR., ONE OF

THE ATTORNEYS OF CREDITORS' COMMITTEE

TO THE HONORABLE JOSEPH R. CRUCIANI, Bankruptcy Judge:

J. Carroll Abernethy, Jr., one of the attorneys for the Creditors' Committee respectfully shows unto the Court:

1. That the said J. Carroll Abernethy, Jr., is an Attorney at Law, offices in the City of Hickory, County of Catawba, State of North Carolina, and that he has practiced law in the said City of Hickory for more than 25 years. That a considerable portion of his practice consists of commercial collection matters and that he served as one of the attorneys for the Creditors'

Committee in the above entitled bankruptcy matter. That as a portion of his work as an attorney for the Creditors' Committee he attended the following hearings in Charlotte, North Carolina, each of which took a minimum of four hours from the time he left his office until he returned, and consisted of a round trip of approximately 100 miles. That the hearings he attended were on the following dates:

June 13, 1973

June 26, 1973

September 25, 1973

October 10, 1973

January 15, 1974

February 14, 1974

April 17, 1974

May 29, 1974

June 18, 1974

December 5, 1974

Total hours attending hearings: 40

Total miles to and from hearings: 1000

2. That in addition, on or about May 13, 1974, the said J. Carroll Abernethy, Jr., prepared for filing an Affidavit and Consent for the Creditors' Committee to be made a party to the Adversary Proceeding which was heard by the Court.

3. In addition thereto, the said J. Carroll Abernethy, Jr., had the following correspondence in regard to this matter:

(1.) September 26, 1973 - Letter to Mr. Joseph H. Frier, Jr.

(2.) October 5, 1973 - Letter to Mr. Joseph H. Frier, Jr.

(3.) October 26, 1973 - Report to Mr. Joseph H. Frier, Jr. on hearing held October 25, 1973

(4.) November 19, 1973 - Letter to Mr. Joseph H. Frier, Jr.

(5.) November 30, 1973 - Letter to Mr. Arthur I. Winard

(6.) January 9, 1974 - Letter to Furst & Furst re. Polaroid Corporation, the creditor

(7.) December 18, 1973 - Letter to Mr. Arthur I. Winard

(8.) December 11, 1973 - Letter to Mr. Joseph H. Frier, Jr.

(9.) January 9, 1974 - Letter to Mr. Joseph H. Frier, Jr.

(10.) March 6, 1974 - Letter to Mr. Joseph H. Frier, Jr.

(11.) March 25, 1974 - Letter to Mr. Arthur I. Winard

(12.) May 8, 1974 - Letter to Mr. Joseph H. Frier, Jr.

(13.) May 21, 1974 - Letter to Mr. Joseph H. Frier, Jr.

(14.) May 31, 1974 - Letter to Mr. Joseph H. Frier, Jr.

(15.) June 18, 1974 - Letter to Mr. Joseph H. Frier, Jr.

(16.) June 21, 1974 - Letter to Honorable Joseph R. Cruciani

(17.) August 22, 1974 - Letter to Mr. Robert J. Bernhardt, Attorney for a creditor

(18.) October 17, 1974 - Letter to Mr. James M. Gaither, Jr.

(19.) October 22, 1974 - Letter to Honorable Joseph R. Cruciani

(20.) December 3, 1974 - Letter to Mr. Arthur I. Winard

(21.) December 10, 1974 - Letter to Mr. Arthur I. Winard

(22.) December 10, 1974 - Letter to creditors of Golden Enterprises

(23.) January 13, 1975 - Letter to Mr. Arthur I. Winard

(24.) March 6, 1975 - Letter to Mr. Arthur I. Winard

(25.) March 7, 1975 - Letter to Popper & Popper, Attorneys for creditors

In addition to the above letters, the said J. Carroll Abernethy, Jr., has received a great deal of correspondence from Mr. Arthur I. Winard, and Mr. Joseph H. Frier, Jr., Attorneys for the Creditors' Committee, some correspondence from Mr. Tommy Golden, correspondence from Mr. James M. Gaither, Jr., Attorney for the bankrupt, and correspondence from various creditors and attorneys for the various creditors inquiring as to the status of the bankrupt's state. Considering reading the correspondence and dictating the replies, a minimum of 30 minutes would have been used for each letter hereinabove set forth, which would make a total of 12 1/2 hours.

4. In addition to the above matters, the said J. Carroll Abernethy, Jr. has had numerous conferences with Mr. James M. Gaither, Jr., Attorney for the Bankrupt, Mr. Meirs and Mr. Peele of First Citizens Bank & Trust Company in Hickory, N. C., Attorney George Huffman who represents Jack Sipe Construction

Company, and with numerous creditors both by telephone and personal correspondence.

It is the opinion of the said J. Carroll Abernethy, Jr., that his services, the services for the Attorney for the Bankrupt, and the services of the other attorneys for the Creditors' Committee were instrumental in conserving the assets of the Bankrupt as of the time of the Adjudication Bankruptcy.

5. That in the calendar year of 1973 the said J. Carroll Abernethy, Jr., from the practice of law, had a gross income of $45,930.44 and a net income of $32,2342.74. That in the calendar year 1974 the said J. Carroll Abernethy, Jr., had a gross income from the practice of law of $61,645.59 with a net income of $45,417.12. That the said J. Carroll Abernethy, Jr., customarily charges a minimum fee of $50.00 per hour for work done in his office and $100.00 per hour on work done out of his office.

6. That the number of hours which the said J.

Carroll Abernethy , Jr., has spent in regard to the above matter, out of his office is 40 hours at the rate of $100.00 per hour, which would be $4,000.00. In addition thereto, the said J. Carroll Abernethy, Jr., has spent a minimum of 12.5 hours in his office in regard to the above matter, which, at the rate of $50.00 per hour would be $625.00. In addition thereto, for travel expense and telephone calls, that the said J. Carroll Abernethy, Jr., has expended a minimum of $120.00.

THEREFORE, the said J. Carroll Abernethy, Jr., respectfully prays the court as follows:

(1) That he be reimbursed for expenses incurred in this matter in the amount of $120.00.

(2) That he be awarded an Attorney's Fee, for his services for the Creditors' Committee in the above entitled matter, in the amount of $4,625.00.

Respectfully submitted, this 14 day of August, 1975.

/s/ J. Carroll Abernethy, Jr.

Attorney at Law

P. O. Box 1492

Telephone No. 322-1060

Hickory, North Carolina 28601

(Acknowledgment omitted in printing)

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

APPLICATION

NOW COMES, James M. Gaither, Jr., Attorney for the Debtor in the above captioned matter and shows unto the court

1. That he has previously filed an Application for Fees with the court on December 18, 1973 and May 20, 1974; that the court has entered an order awarding fees in the amount of $34,433.75 plus expenses advanced through May 20, 1974 in the amount of $2,240.13; (See Exhibit "c") that your applicant has received the sum of $9,000.00 as partial payment toward the order formerly entered by the court.

2. That your applicant owes Golden Enterprises in the amount of $75.00 for goods purchased at the inventory liquidation.

3. That since May 20, 1974 your applicant has performed services that have been beneficial to the bankrupt estate as set forth in Exhibit "A" attached hereto.

4. That since May 20, 1974 your applicant has performed services that have been beneficial to the bankrupt estate as set forth in Exhibit "B" attached hereto.

5. That the proper affidavit to comply with Rule 219 has been previously filed with the court.

6. That the hourly rate charged for the professional services rendered in this matter is $50.00 per hour.

7. That the total hours spent performing beneficial services for the estate of Golden Enterprises since May 20, 1974 is 373.3 hours.

WHEREFORE, your applicant prays unto the court:

1. for an order awarding attorneys fees for the attorney for the debtor in the Chapter 11 procedure that was converted to a straight bankruptcy on February 14, 1975;

2. that the court award additional expenses advanced

since May 20, 1974 to April 3, 1975 in the amount of $2,576.39;

3. for such other and further relief as the court may deem proper.

This the 18th day of August, 1975.

GAITHER & GORHAM

Post Office Box 1650

Hickory, North Carolina 28601

Telephone (704) 322-5505

(Verification omitted in printing)

(Jurat omitted in printing)

EXHIBIT A

May 1974		Hours
5-13-74	Trip to Charlotte regarding Commercial Credit	3.0
5-20-74	Letter to Joe Golden	.1
	Letter to California taxing authorities	.5
	Drafting notice of hearing on fees	.2
5-21-74	Amendment to complaint	1.5
	Drafting order relating to attorney's fees	.2
5-22-74	Examination of claim of Panasonic	.5
	Statement of taxes due State of California	.2
	Letter to Murray Tate	.1
5-23-74	Receipt of offer on shopping center	.1
	Negotiations related thereto	5.0
5-24-74	Letter from Winard	.1
	Examination of rent claim	.5
	Letter from creditor	.1
	Letter from creditor	.1

	Letter to Lester Key	.2
5-28-74	Letter from Thomas Golden	.2
	Drafting agreement between Butner, McKaughn, Sipe and Creditors' Committee	1.0
5-29-74	Letters to various creditors regarding disbursement order filed on May 28, 1974	.5
	Order for Commercial Credit Business Loans and negotiations related thereto and research	20.0
	Attending hearing in Charlotte	4.0
5-31-74	Letter from Joe Golden	.1
June 1974		
6-3-74	Letter from Edgar Love	.1
6-5-74	Letter to Joe Golden	2.6
	Letter to Register of Deeds	.1
	Letter to Friar	.1
6-7-74	Letter to Friar	.1

	Letter to creditor	.1
	Letter to Golden	.1
	Letter to Bankruptcy Office	.1
6-10-74	Letter to creditor	.1
	Letter to Edgar Love	.1
	Letter to George Huffman	.1
	Letter to Bankruptcy Office	.1
	Letter to creditor	.1
	Letter to creditor	.1
	Letter to N. C. Department of Revenue	.2
	Letter to John Cantrell	.2
	Letter to Sam Allison	.5
6-10-74	Drafting order	.3
	Letter from Hickory Tax Collector	.1
June 1974	Drafting note and deed of trust for $360,000 and negotiations related thereto	6.0
6-12-74	Trip to New York	8.0
6-13-74	Letter from George Huffman	.2

	Letter to Golden	.1
6-14-74	Letter from Friar	.1
	Letter from Winard	.1
	Letter to Murray Tate	.1
	Hearing in Charlotte with Marine Midland preparation	10.0
	Attending hearing	4.0
6-11-74	Letter from Bankruptcy Office	.5
6-15-74	Letter from creditor	.1
6-17-74	Drafting order regarding Marine Midland	.2
	Letter from creditor	.1
6-18-74	Letter to Bankruptcy Office	.2
	Letter to Edgar Love	.2
	Letter from Bankruptcy Office	.5
	Letter from Edgar Love	.2
	Letter to H. D. Frye	.3
6-20-74	Letter from Bankruptcy Office	.2
6-24-74	Letter from Commercial Credit	.2

6-25-74	Negotiations for sale of accounting machines	4.0
6-26-74	Letter from North Carolina Attorney General	.5
	Letter to Edgar Love	.2
6-27-75	Letter to Bankruptcy Office	.2
	Letter from Bankruptcy Office	.2
	Examination of Golden's figures on real estate	1.0
	Letter from Marine Midland	.2
6-29-74	Letter from Golden to Bill Burton	.2
	Letter from Golden to Dean Whisnant	.2
	Negotiations regarding closing of loan from Shelby Savings & Loan	20.0
May & June, 1974	Negotiations with Silverman Sales regarding sales inventory	20.0
	Examination of Golden's cash receipts and disbursements	1.0

July 1974

7-2-74	Drafting letter to Thomas Golden	3.0
7-3-74	Letter to Register of Deeds	.2
	Letter to creditor	.1
7-1-74	Letter from Friar	.1
7-4-74	Conference with Manning Silverman and Harold Dennis	3.5
	Conference with Joe Golden	1.0
	Telephone conference with Thomas Golden	2.5
7-5-74	Marine Midland research	1.0
7-17-74	Drafting application to extend time for docket and for filing application to confirm	1.5
7-18-74	Letter to Register of Deeds	.1
	Letter to Jack Setzer	.5
	Call from Golden	.5
7-15-75	Letter regarding Superior Continental lease and negotiations	4.3

	Letter from Superior Continental regarding lease negotiations and drafting	2.5
7-22-74	Letter to Friar	.1
	Letter to Jack Sipe	.2
	Letter to Golden	.1
	Letter from Golden	.6
7-23-74	Letter from Jack Kincaid	.4
	Letter to George Huffman	.5
	Letter from Bankruptcy Office	.2
7-24-75	Letter to Joe Golden regarding real estate	.2
	Letter from Silverman Sales	.5
7-25-74	Hearing on Marine Midland claim	2.3
	Copy of letter from Bankruptcy Office	.2
	Letter to Bankruptcy Office	.5
7-26-74	Letter from Department of Revenue	.2
	Proof of claim with Georgia taxing authorities	.1
	Order relating to real estate - drafting	.5

	Negotiations	5.0
	Drafting motion	1.5
	Trip to Charlotte regarding Marine Midland	4.0
7-31-74	Examination of Golden's cash receipts and disbursements	1.0
	Letter from Department of Justice	.1
	Letter from George Huffman (real estate)	.1
	Letter from creditor	.2
	Letter from creditor	.1
	Letter from creditor	.1
	Letter to Thomas Golden	.1
	Letter from Commercial Credit	.1
	Negotiations regarding real estate	5.0
7-8-74	Negotiations for consent order	4.0
	Consent order	1.0
7-16-74	Letter to Edgar Love	.1
	Drafting objection to allowance of claim	.5
July 1974	Negotiations for sale of accounting	

	equipment	4.0
June & July 1974	Complaint to sell real estate and negotiations related thereto	5.0
7-30-74	Letter from Joe Golden	.1
<u>August 1974</u>		
8-12-74	Letter from Winard	.5
8-15-74	Letter to Department of Revenue	1.0
8-19-74	Letter to creditor	.1
8-20-74	Letter from Winard	.1
8-22-74	Letter from creditor	.1
8-22-74	Attending hearing in Charlotte regarding fees	4.0
	Final negotiations for judgment and order against Marine Midland	1.5
8-29-74	Letter from Golden	.5
	Letter to Friar from Golden	.5
	Letter from Winard	.5
	Letter from creditor	.1
	Letter from Friar	1.0

8-30-74	Letter from creditor	.1
August 1974	Letter from Golden and related conferences regarding real estate management	14.0
	Examination of cash receipts and disbursements	1.0
	Negotiations regarding payment of approximately $30,000 in ad valorem taxes	14.0
September 1974		
9-7-74	Letter from Bankruptcy Office regarding disbursing agent	.5
9-9-74	Lawson Styles - negotiation regarding lease and letter	4.0
	Letter from Golden	.1
	Letter from Maurice Capps regarding McKaughn and Butner deed of trust and negotiations related thereto	5.0
9-11-74	Letter to Bankruptcy Office	.2

	Letter to Joe Golden	.5
9-12-74	Letter from creditor	.2
	Letter to Joann Harris regarding disbursement account	.1
9-10-74	Letter from creditor	.1
9-13-74	Letter from Bankruptcy Office	.1
9-16-74	Letter to Superior Continental regarding lease	.5
	Letter from Golden	.1
	Letter from Golden	.1
9-18-74	Letter to Duke Power	.2
	Letter from Golden	.1
	Letter from Winard	.1
9-19-74	Letter from creditor	.1
9-25-74	Letter to Golden	.1
	Letter to Joe Golden	.1
	Various letters from creditors	1.2
9-26-74	Letter to George Huffman	.1
	Letter to Bankruptcy Office	.1

	Letter to California taxing authorities	.1
	Letter to Golden regarding ad valorem property taxes	.1
9-30-74	Letters regarding taxes	.8
	Motion in the cause, drafting and filing	1.5
	Filing objection to claim of William Grooh and research related thereto and hearing thereon dated 10-16-74	4.5
	Drafting statement of disbursement on loan from Shelby	1.0
	Conference with George Huffman, Shelby Savings & Loan, Catawba County and City of Hickory taxing authorities	4.5

October 1974

10-3-74	Trip to New York regarding real estate and amendment of plan	20.0
10-8-74	Drafting letter to Judge Cruciani regarding status report	3.5
	Letter from J. Golden	.3

10-17-74	Letter from Carroll Abernethy	1.0
10-21-74	Letter to Carroll Abernethy regarding real estate	.4
10-29-74	Letter from Frank Baker	.5
10-31-74	Letter to Joe Golden	.5
	Drafting and computing monthly income and outgo for leases	12.5
	Drafting description of mortgages	4.2
	Examining disbursements	1.0
	Letters from creditors	1.0

July to November

1974	Drafting lease agreement between Golden Enterprises, William E. Butner, R. L. McKaughn, and Jack Sipe	1.0
	Drafting cancellation of assignment	1.0
	Drafting assignment	1.0
	Drafting subordination agreement	2.5
	Negotiations related to the above	10.4

November 1974

11-4-74	Letter to Joe Golden regarding leases on shopping center and accumulating contained in letter	4.5
	Letter to Robert Smoak - conferences regarding sale of real estate	2.3
	Letter to Bankruptcy Office	.2
	Letter to Dewey B. Wright regarding sale of Golden real estate and conferences related thereto	1.0
	Letter to Carroll Abernethy	.2
	Letter to Maurice Capps regarding sale of Golden real estate and conference related thereto	2.3
	Letter to Joseph Friar	.2
	Letter to Arthur Winard	.2
	Letter to Thomas Golden	.2
	Letter to William J. Lawing and conferences related to sale of shopping center	1.5

	Letter to Joe Golden	.1
	Letter to Robert Williams and conferences regarding Golden property	1.0
11-5-74	Letter to Thomas Golden regarding Deed of Easement to the City of Hickory across real estate owned by Golden	.5
	Conferences with City of Hickory regarding easement	1.0
	Letter to Golden regarding sale of fixtures	.3
11-6-74	Letter from Joe Golden regarding Fidelity Federal mortgage	.2
	Letter from Joe Golden regarding lease agreement	.5
	Computation of tax statements to Superior Continental and letters relative thereto	1.3
11-8-74	Conferences with Golden regarding	

Creditors' Committee, Chapter X, and real estate 1.3

11-12-74 Letter to Joe Golden .1

Letter from Joe Golden .1

Drafting motion to continue deposit due date; drafting order, letter to bankruptcy office 1.3

Letter to Joe Golden regarding real estate .2

11-14-74 Letter to Murray Tate regarding deed of easement .6

Letter to Thomas Golden .1

11-15-74 Letter from Joe Golden .6

11-18-74 Letter from City of Hickory regarding deed of easement .3

Letter to Thomas Golden regarding deed of easement .1

11-20-74 Letter from Thomas Golden regarding liquidation .6

11-20-74 Letter from Thomas Golden regarding deed of easement and fixture sale .2

11-21-74 Letter to Murray Tate regarding lease agreement and mortgages .1

Letter to Superior Continental Corp. regarding conversion .2

Letter to Thomas Golden regarding show cause notice .1

11-25-74 Letter to Joe Golden regarding ad valorem taxes .1

11-25-74 Various letters from creditors and replys 2.1

11-29-74 Reply to request for admissions in Grooh matter .5

Cash projections relative to cash flow of Golden properties 3.0

December 1974

12-1-74 Drafting affidavits for show cause hearing 4.0

	Letters from Thomas Golden	1.0
12-5-74	Hearing on claim of William Grooh	2.0
	Research related to above hearing	2.0
	Attending show cause hearing in Charlotte	4.0
12-12-74	Letter from George Huffman	.5
	Negotiations with James Hassell regarding sale of real estate	1.0
12-19-74	Drafting disbursement order	1.0

January 1975

1-2-75	Drafting letter to SBA regarding sale of company	1.0
	Negotiations with David Reule as follows:	
	Assembling information	4.0
	Various conferences	4.0
	These conferences regarded the appraised value of the real estate	

February 1975

	Attending adjudication hearing	4.0
	Affidavit regarding statement of assets of Golden	2.0
2-25-75	Letter to First Citizens Bank regarding Golden assets	.5
	Letter to Joe Cagle regarding assets	.5

April 1975

4-9-75	Drafting statement of unpaid debts incurred by debtor in possession	.5
	Drafting accounting of disbursement account	.5
4-3-75	Drafting statement of affairs	4.0
TOTAL HOURS		373.30

EXHIBIT "B"

EXPENSES ADVANCED

From May 20, 1974 to April 3, 1975

(Itemization omitted in printing)

Total $2,576.39

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

BANKRUPTCY NO. ST-B-73-6

JOE N. CAGLE, Trustee in Bankruptcy for Golden Enterprises, Inc., Plaintiff, vs. SHELBY SAVINGS & LOAN ASSOCIATION, et al, Defendants.

NOTICE OF APPEAL TO DISTRICT COURT

WILLIAM E. BUTNER, defendant and secured creditor of the above-captioned bankrupt, appeals to the District Court from the Order of the Bankruptcy Judge entered in this cause on August 11, 1975, confirming the sale of two (2) tracts of real estate of Golden Enterprises, Inc.; denying the request of the beneficiaries of second deeds of trust on said property for the trustee to abandon and convey said real estate to said beneficiaries; and delay by the Court in determining the validity, priority, and amounts of liens and rights and interests of the Employment Security Commission of

North Carolina, William E. Butner, Robert L. McKaughn, and Jack Sipe Construction Company, beneficiaries of the outstanding second deeds of trust on the real estate of the bankrupt; and taxing the costs of the proceedings herein including all expenses coincidental to the sale of real estate as a part of the costs of administration.

The parties to the Order appealed from and the addresses of their respective attorneys are as follows:

1. James M. Gaither, Jr.
   Attorney for the Bankrupt
   Post Office Box 1650
   Hickory, North Carolina 28601

2. George Huffman
   Attorney for Jack Sipe Construction Company
   Post Office Box 2021
   Hickory, North Carolina 28601

3. C. B. Cash, Jr.
   Attorney for Shelby Savings and Loan Association

   Post Office Box 729
   Shelby, North Carolina 28150

4. William R. Sigmon
   Attorney for Fidelity Federal Savings and Loan Association
   Post Office Box 1792
   Hickory, North Carolina 28601

5. J. Carroll Abernethy, Jr.
   Attorney for the Creditors Committee
   Post Office Box 1492
   Hickory, North Carolina 28601

This the 19th day of August, 1975.

/s/ William E. Butner

BUTNER, RUDISILL & BRACKETT

Attorneys for the Appellant

Post Office Box 2323

Hickory, North Carolina 28601

(704) 322-3130

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

MONTHLY FINANCIAL REPORT

August, 1975

607a

The undersigned Trustee submits the following report of receipts and disbursements in the month of August, 1975:

Cash Balance		$ 100,944.52
Rental Income Receipts:		
Beltone (Aug. rent)	$ 538.87	
Superior Continental (Aug. rent)	3,276.04	
Superior Continental (Aug. rent)	5,540.62	
Superior Continental (Aug. rent)	4,750.00	
C.I.T. Financial Services (Aug. rent)	487.50	
Iron Gate Restaurant (Aug. rent)	652.44	
Metelpel (Aug. rent)	1,015.62	
Travel World (June rent)	325.00	
Frelon Broome Insurance (Aug. rent)	350.00	
Capitol Credit (Aug. rent)	350.00	
PPV, Inc. (Aug. rent)	245.00	$ 17,531.09
Total Cash		$ 118,475.61
Cash Disbursements:		
Nancy Griffin - Entering claims	$ 180.00	

608a

Keever's Key & Repair Service - Keys for Shop-		
ping Center	$ 22.80	
The Charlotte Observer - Advertising Notice of		
Sale	158.40	
The Charlotte Observer - Advertising Notice of		
Sale	172.20	
Hickory Daily Record - Advertising Notice of Sale	61.20	
Hickory Daily Record - Advertising Notice of Sale	61.20	
Advanced Court Reporters - Appearance fee	10.00	
City of Hickory - Utility bill under lease	6.63	
City of Hickory - Utility bill under lease	6.63	
City of Hickory - Utility bill under lease	6.63	

609a

City of Hickory - Utility bill under lease	16.00	
Duke Power Company - Utility bill under lease	77.52	
Duke Power Company - Utility bill under lease	67.26	
Duke Power Company - Utility bill under lease	135.91	982.38
	Balance on Hand	$117,493.23

*Rental payments for the month of July and Aug. have not been received from Travel World.

*Of the Balance on Hand, $117,000.00 is deposited in a Passbook Savings Account at North Carolina National Bank.

This is to certify that the above represents a true and accurate record of the receipts and disbursements of the undersigned Trustee during the month of Aug., 1975, in the above-referenced estate.

610a

/s/ Joe N. Cagle, Trustee

P. O. Box 2050

Hickory, NC 28601

COUNSEL:

Joe N. Cagle, Attorney

CAGLE AND HOUCK

P. O. Box 2050

Hickory, NC 28601

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

MOTION FOR AMENDMENT AND ALTERATION OF JUDGMENT AND MOTION FOR A NEW HEARING

WILLIAM E. BUTNER, creditor, by and through the undersigned attorney of record, respectfully moves the Court, pursuant to Rule 752(b) of the Rules of Bankruptcy Procedure, to alter or amend the Order entered August 11, 1975, confirming the sale of certain real property of the above-named bankrupt, and further respectfully moves this Court, pursuant to Rule 923 of the Rules of Bankruptcy Procedure, for a new hearing on the Order of confirmation of sale of real property in this cause for the reasons hereinafter set forth:

1. SUMMARY OF FACTS. That your movant is a second mortgagee of the property which is the subject

matter herein by virtue of those Deeds of Trust having a combined original amount of Three Hundred Sixty Thousand ($360,000.00) Dollars dated March 13, 1973, and July 1, 1974, and recorded in Book 1018 at page 788 and Book 1051 at page 184, respectively, Catawba County Registry; that since May, 1973, and until April, 1975, the property of Golden Enterprises, Inc., was administered pursuant to Chapter XI of the Bankruptcy Act; that on or about April 16, 1975, a hearing was held in Federal District Court, Statesville, North Carolina, with the Honorable Joseph R. Cruciani presiding, wherein it was considered whether to convert the administration of the property of Golden Enterprises, Inc., to a straight bankruptcy proceeding.

At said hearing appraisals were submitted as to the value of the real property herein by Mercer W. Simmons, MAI, and by Reule Investment Company. Copies of said appraisals are attached hereto and marked as Exhibits "A" and "B" respectively.

At that time, as now, there were first Deeds of Trust on the property as follows:

(1) The warehouse and office located at 1516 "F" Avenue, S. E., Hickory, North Carolina (known as Metelpel Products Building), is subject to a first Deed of Trust to James M. Gaither, Jr., Trustee, in favor of the First National Bank of Catawba County, Hickory, North Carolina, dated February 19, 1971, in the original amount of Seventy-Four Thousand ($74,000.00) Dollars, recorded in Book 967 at page 160 in the Catawba County Registry.

(2) The property located as 231 Ninth Street Lane, S. E., Hickory, North Carolina (known as Continental Systems Building), is subject to a first Deed of Trust to Joseph C. Whisnant, Trustee, in favor of Shelby Savings and Loan Association, Shelby, North Carolina, dated February 11, 1971, in the original amount of Two Hundred Sixty Thousand ($260,000.00) Dollars, recorded in Book 967 at page 28 in the Catawba County

Registry.

(3) A major portion of the warehouse facility located at 1120 Tate Boulevard (Eastern Access), Hickory, North Carolina (known as Tate Boulevard Property), is subject to a first Deed of Trust to Joseph C. Whisnant, Trustee, in favor of Shelby Savings and Loan Association, Shelby, North Carolina, dated April 2, 1973, in the original amount of Seven Hundred Fifty-Five Thousand ($755,000.00) Dollars, recorded in Book 1020 at page 660 in the Catawba County Registry.

(4) The real estate located on Fourth Street Drive, S. W., Hickory, North Carolina (known as Office Complex or Shopping Center), is subject to a first Deed of Trust to Lee Dennis, Trustee, in favor of Fidelity Federal Savings and Loan Association, Hickory, North Carolina, dated August 11, 1972, in the original amount of Two Hundred Thousand ($200,000.00) Dollars, recorded in Book 1005 at page 495 in the Catawba County Registry.

At that time, as now, your movant was a secured creditor pursuant to second Deeds of Trust on the above-described property in the combined original amount of Three Hundred Sixty Thousand ($360,000.00) Dollars dated March 13, 1973, and July 1, 1974, and recorded in Book 1018 at page 788 and Book 1051 at page 184, respectively, in the Catawba County Registry.

From the facts presented, it was clear that as of April 16, 1975, there was no equity whatsoever in said property which could be used for the benefit of the general creditors and little equity for the second Deed of Trust, secured creditors.

Your movant appeared at said hearing and argued that on the basis of facts and evidence before the Court that the property should be abandoned to the second mortgagees, subject to the lien of the first mortgagees, so that further unnecessary costs of administration could be avoided, and the said second mortgagees could attempt to recoup part of their claim; that the

trustee of the bankrupt estate, the Honorable Joe N. Cagle, also stated that abandonment was proper.

That at the hearing on April 16, 1975, the Honorable Joseph R. Cruciani refused to order abandonment of the property, stating that it appeared that the status of the economy would be improving and that the proceeds of sale might be better than the evidence indicated. Judge Cruciani further indicated that, if the proceeds of the sale were not sufficient, the sale would not be confirmed and that abandonment would then be proper.

That on Monday, July 28, 1975, after due advertisement, a public sale was had of the property herein, and the results of said sale were as follows:

(1) Warehouse and office located at 1516 "F" Avenue, S.E., Hickory, North Carolina (known as Metelpel Products Building).

Highest bid above balance of first mortgage:

$43,500.00

(2) Property located at 231 Ninth Street Lane, S. E., Hickory, North Carolina (known as Continental Systems Building).

Highest bid above balance of first mortgage:

$75,000.00

(3) Warehouse facility located at 1120 Tate Boulevard (Eastern Access), Hickory, North Carolina (known as Tate Boulevard Property).

Highest bid above balance of first mortgage:

$100.00

(4) Real estate located on Fourth Street Drive, S. W., Hickory, North Carolina (known as Office Complex or Shopping Center).

Highest bid above balance of first mortgage:

$28,000.00

That the results of the sale as it affects the secured creditors and general creditors are shown on Exhibit "C" attached hereto.

That the hearing regarding the confirmation of the

sale of July 28, 1975, was held the day following the sale, to wit: July 29, 1975; that because of the small amounts bid on the above-described property, in light of the proceedings on April 16, 1975, your movant in good faith believed that the sale of the property would not be confirmed. For these reasons and because of the one-day period between the sale and the hearing regarding confirmation thereof, your movant did not have sufficient time, nor did he feel it necessary, to prepare legal authority and evidence for consideration by this Court in denying the confirmation of the sale; that movant has now discovered and gathered such legal authority and evidence as he believes would allow the Court to grant to your movant the relief sought herein as is more particularly described hereinafter.

2. ABUSE OF DISCRETION IN ORDERING AND CONFIRMING SALE. Movant alleges that given the facts hereinbefore set forth, to sell the real property herein free of the liens of the second mortgage hold-

ers, secured creditors, was not in keeping with the goal of the bankruptcy proceedings, to wit: maintaining the integrity of the Court in the equitable distribution of the estate of the bankrupt. Matter of Malter (Ref. Col. 1940) 47 Am.B.R.(N.S.) 172, mod. and aff'd sub nom. Stout v. Green (C.C.A. 9th, 1942) 52 Am.B.R.(N.S.) 63, 131 F.(2d) 995.

Although it is well settled that the bankruptcy courts may, if administration interests so require, sell property of bankrupt estates free of all claims, liens and encumbrances, movant alleges that the sale of the property herein, free of the second Deed of Trust, is not in the best interest of an equitable and proper administration of the estate herein. Collier on Bankruptcy Vol. 4A, Sec. 70.97 at page 1133, 1975.

In the case at bar, the uncontroverted evidence at hearings, and on the basis of appraisals submitted, is that the four tracts of property herein would sell for less than the sum of the liens of the first and second

mortgages by which they are encumbered. Movant submits that the property herein should have been released by the Court, and possession and control surrendered to the second mortgagees so said second mortgagees could foreclose or otherwise proceed in a court of competent jurisdiction. Federal Land Bank v. Kurtz (C.C.A., 4th Cir.), 25 Am.B.R.(N.S.) 63, 70F.(2d) 46; Manufacturers Bank and Trust Co. of St. Louis v. Lauchli (C.C.S. 8th, 1941) 45 Am.B.R.(N.S.) 772, 118 F.(2d) 607; Hoehn v. McIntosh (C.C.A. 6th, 1940) 42 Am.B.R.(N.S.) 475, 110 F.(2d) 199. In the Hoehn case, the Court said: "...ordinarily a bankruptcy court will not administer property burdened with liens when it is manifest that it will sell for less than the amount thereof, because it should not assume jurisdiction over that which it cannot administer. Under such circumstances, the Court should order the release and surrender possession and control of the property to the lienor to foreclose or otherwise proceed

. . ." Collier on Bankruptcy, Vol. 4A, Sec. 70.97, at page 1138, 1975.

Collier states, "It is a well settled rule that ordinarily a sale free of liens, claims and encumbrances should be ordered only where there is a reasonable probability that, if so sold, the property will bring more than the aggregate of encumbrances and sales expenses."

Union Electric Co. v. Hubbard (C.C.A., 4th Cir.), 39 Am.B.R. 529, 242 Fed. 248;

Federal Land Bank of Baltimore v. Kurtz (C.C.A., 4th Cir.) 25 Am.B.R.(N.S.) 63, 70 F.(2d) 46.

Movant argues that, if this rule is applicable in the decision ordering the sale, given the facts at bar prior to sale, and the further fact that the results of the sale, confirmed on August 11, 1975, proved the indications prior to sale were accurate, that this rule should be applied in deciding whether or not to confirm the sale and that the sale in the case at bar should

never have been had, and given the results of said sale, it is manifest that the sale should not be confirmed.

Movant, second mortgagee, made timely argument prior to the sale herein that the property should be abandoned to said second mortgagees, and that the Court should not burden itself with expenses of administration and/or sale since there was obviously no equity for the general creditors nor any other benefit likely to inure to the benefit of the general estate. For the same reasons, movant argues that the sale herein should not be confirmed and respectfully cites as authority the following: Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 28 Am.B.R.(N.S.) 397, 55 S.Ct. 854, 79 L.Ed. 1593, 97 A.L.R. 1106; Federal Land Bank of Baltimore v. Kurtz, supra; Union Electric Co. v. Hubbard, (C.C.A., 4th Cir.), 39 Am.B.R. 529, 242 F. 248; Kimmel v. Crocker (C.C.A., 10th Cir.) 26 Am.B.R.(N.S.) 571, 72 F.

(2d) 599.

Courts have repeatedly held that where liens are of such amount that there is likely no excess of value in the property for the general creditors it should be surrendered to the lienholders. Movant argues that sale of the property in the instant case should not be confirmed and the property surrendered to the second mortgagees. In re Harralson (C.C.A., 8th Cir.), 24 Am.B.R. 715, 179 F 490, 29 L.R.A.(N.S.) 737. In re Franklin Brewing Co. (C.C.A., 2d Cir.), 41 Am.B.R. 51, 249 F. 333.

Movant further argues that the sale of the property herein free of the second Deed of Trust and a confirmation of said sale would be an abuse of discretion since there is obviously no equity for the bankrupt estate and the second mortgagees have not consented to said sale. Seaboard National Bank v. Rogers Milk Products Co. (C.C.A., 2d Cir.), 21 F.(2d) 414; In re National Grain Corp. (C.C.A., 2d Cir.), 7 Am.B.R.(N.S.) 422, 9 F.(2d) 802; Federal Land Bank of Baltimore

v. Kurtz; supra; Gantt v. Jones (C.C.A., 4th Cir.), 46 Am.B.R. 351, 272 F. 117.

The second mortgagees herein have repeatedly offered to take the property herein in satisfaction of their claim. As quoted in Collier, supra, In Matter of Menzies (D.C., Ariz.), 21 Am.B.R.(N.S.) 687, 60 F.(2d) 1064, the Court said: "It is well settled that the trustee is not required to administer property burdened with liens or mortgages, and he may abandon the same to secured creditors; IN FACT, IT IS HIS DUTY TO DO SO WHENEVER IT IS CERTAIN THAT THE GENERAL ESTATE WILL DERIVE NO BENEFIT FROM THE SALE OF SUCH PROPERTY" (emphasis added) . . . A trustee is not bound to administer property subject to liens to such an extent that nothing can be realized therefrom for the benefit of unsecured creditors. IN SUCH CASE, WHAT OUGHT TO BE DONE IS FOR THE TRUSTEE TO NEGOTIATE WITH THE MORTGAGEE AND SEE IF HE WILL NOT TAKE THE PROPERTY IN SATISFACTION OF HIS CLAIM." (emphasis

added)

Movant alleges that the uncontroverted facts before this Court are that there is no equity in the property for general creditors, little equity for the second mortgagees, and these facts were further substantiated by the results of the sale now contested. Movant alleges that precedent and equity require that the sale not be confirmed and the property surrendered and abandoned to the second mortgagees so that they may attempt to recoup some or all of their secured claim.

3. LEGAL AND LOGICAL REASONS FOR ABANDONMENT. The paramount purpose of bankruptcy liquidation and administration is the reduction of the bankrupt's property to money as quickly as practicable so as to secure funds for distribution to general creditors. Therefore, the trustee in examining the various assets with regard to their potential value when converted into money for distribution to creditors is initially faced with the duty to concentrate on property which

will prove most beneficial to the estate and to eliminate property that will be either valueless or unprofitable in its administration. Whether or not a trustee may abandon and disclaim the title to property which by provision of the bankruptcy law has been transferred to him is an alternative and well established by a long line of legal authorities. The trustee may abandon any property which is either worthless, or overburdened, or for any other reason certain not to yield any benefit to the general estate. American File Co. v. Garrett, 110 U.S. 288, 4 S.Ct. 90, 28 L.Ed. 149; Stanolind Oil & Gas Co. v. Logan (C.C.A., 5th Cir.), 34 Am.B.R.(N.S.) 685, 92 F.(2d) 28, cert. den. 302 U.S. 763, 58 S.Ct. 409, 82 L.Ed. 592 and 303 U.S. 636, 58 S.Ct. 522, 82 L.Ed. 1097; Central States Life Insurance Co. v. Koplar Co. (C.C.A., 8th Cir.), 30 Am.B.R.(N.S.) 236, 80 F.(2d) 754, cert. den. 298 U.S. 687, 56 S.Ct. 955, 80 L.Ed. 1406, and cases cited.

Rule 608 of the Rules of Bankruptcy Procedure empowers the bankruptcy court to abandon property as follows: "The court may, on application or on its own initiative and after hearing on such notice as it may direct, approve the abandonment of any property ..."

The trustee having been vested with the title to the property of the bankrupt has a reasonable time for considering the advisability of retaining or abandoning an encumbered or otherwise not clearly beneficial asset. The term "reasonable" implies that the period of deliberation is adaptable to the circumstances. The trustee may wait until he is able to ascertain whether there is any profit to be expected for the estate. This is particularly true where the prospects depend on fluctuating market conditions. In re Wiseman & Wallace (D.C., Pa.), 20 AmB.R. 293, 159 Fed. 236; Matter of Conemaugh Coal Mining Corp. (D.C., Pa.) 8 Am.B.R. (N.S.) 835, 18 F.(2d)682.

In dealing with the rights and liabilities connected

with abandoned property and accruing prior to formal abandonment, the courts have usually taken a more favorable view to third persons such as mortgagees and lienholders. Thus rents accruing between filing date and abandonment have been allotted to a mortgagee, whereas the estate was not, through abandonment, relieved of its share of expenses incurred prior to disclaimer. Robinson v. Dickey (C.C.A., 3d, Cir.), 15 Am.B.R.(N.S.) 267, 36 F.(2d) 147, cert. den. 281 U.S. 750, 50 S.C.t. 354, 74 L.Ed. 1161.

In fact, in Equitable Loan & Sec. Co. v. Moss & Co. (C.C.A., 5th Cir.), 11 Am.B.R. 111, 125 F.(2d) 609, the bankruptcy court was directed to release encumbered property on condition that the lienholder reimburse the trustee for his outlay on expenses in connection with maintaining the property less rentals received.

4. REQUEST FOR RELIEF. Based upon the foregoing recapitulation of the evidence and the situation of equitable and legal authority, movant herein re-

spectfully requests that the Order heretofore entered confirming sale of real property of Golden Enterprises, Inc., be altered and amended as follows:

(1) That the Court find as an additional fact that the movant herein is a secured creditor with rights prior and superior to general creditors.

(2) That the Court find as a fact that there is no equity in the property subject to the confirmation for distribution to the general creditors.

(3) That the Court find as a fact that confirmation of the sale of the real estate of Golden Enterprises, Inc., will produce no additional funds for distribution to the general creditors.

(4) That the Court find as a fact that abandonment of the property to the beneficiaries of the second Deed of Trust secured by said property subject to the first Deeds of Trust would place the beneficiaries of the first Deeds of Trust in the same situation as would confirmation of the sale of said real property

subject to the first Deeds of Trust.

(5) That the Court alter its judgment to conclude as a matter of law that the confirmation of the sale of real property of Golden Enterprises, Inc., as heretofore entered in this cause would produce no revenues for distribution to the general creditors and would substantially diminish the recovery of the beneficiaries of the second Deed of Trust secured by said property, and would further increase the costs of administering the estate of the bankrupt.

(6) That the confirmation of the sale of real estate of Golden Enterprises, Inc., at the sales prices heretofore reported by the trustee in bankruptcy is neither legally or equitably justified and is therefore denied.

This the 19th day of August, 1975.

BUTNER, RUDISILL & BRACKETT

Attorneys for the Defendant

Post Office Box 2323

Hickory, North Carolina 28601

By: /s/ J. Richardson Rudisill, Jr.

Exhibit "A"

The trustee, Joe N. Cagle, states that no formal written appraisal exists. See figures contained in trustee's Order dated August 4, 1975, as to appraisals submitted by Mercer W. Simmons, MAI.

January 22, 1975

Mr. James M. Gaither, Jr.

Butner & Gaither

Attorneys & Counsellors At Law

27 First Avenue, N. E.

Hickory, North Carolina 28601

Re: Income Analysis Of Real Property

Golden Enterprises, Inc.

Hickory, North Carolina

Dear Mr. Gaither:

Since our meeting, in your office on January 3, 1975, I have as agreed, compiled an Income Analysis of the four (4) income producing properties of the subject firm, and attempted to find an Investor-Purchaser for same.

Enclosed herewith are the four (4) analysis' of the properties.

Property	Page	Estimated Investment Value Above First Mortgage
1516 "F" Avenue, SE	A-1	$49,975.73

231 Ninth St. Lane, S.E.	A-2	$ 110,342.34
1120 Tate Boulevard	A-3	$ 57,925.73
Fourth Street Drive	A-4 & 5	$ 93,454.66
TOTAL		$311,698.46

It is the opini n of the writer, that the above figures represent a proper estimate of the Investment Fair Market Value, of each of the properties.

Since these figures are no way near the figures you gave me, which you stated an M.A.I. Appraiser had placed on the properties, I feel I must explain the difference in our approach.

1. None of our projections and assumptions take into consideration the present depressed economic situation we are now in.

2. A knowledgable investor, purchasing real property today, can get a 12% plus cash on cash return, investment with a AAA type tenant, long term pure net leases.

3. Real Property once improved and ready for use, in my opinion, loses its real estate characteristics and becomes a financial kind of vehicle. It therefore loses its relationship to cost in land, bricks and mortar and instead reacts to market conditions for its type of use. When studying these analysis', the following meanings apply:

Scheduled Gross Income: This is all of the income, which the project can conceivably produce, if the property is not under a long term lease, the income is escalated at 5.4% per year, where applicable.

Operating Expenses: These items are taken from figures furnished by Mr. Joe Golden and the experience of the writer, in dealing with these types of properties.

Reserves: It is necessary to set aside a small amount of money for reserves on each of the properties, since it is conceivable that, when the

property is turned back to the Landlord a new parking lot or some other major type of repair could be required, in order to make the property tenantable again, therefore, reserves must be set aside.

Interest: It is necessary to calculate some interest for all reserves, since this has a direct reflection on taxable income.

Net Operating Income: This figure represents the figure after all expense items and reserves have been deducted from the income, but the mortgage payment has not been made.

Gross Spendable Income: This item is the actual income that the owner of the property can take home. It is all of the expenses and the mortgage payment deducted from the gross income.

Gross Equity Income: This item represents, on a year to year basis, the return on the total project from mortgage payments and gross spendable income, plus reserves, however, you must keep in mind

that this money is not spendable, until such time as the property is sold, therefore, this is not a good reflection of income, until that time.

Estimated Investment Value: This value is determined by taking the gross spendable income and discounting it using the 12% factor for each year, through the first ten years of ownership; at which time the reversion of the property or the sale of the property is converted to cash, less any outstanding mortgage balance at that time. This figure is then discounted with the 12% factor and added to the ten (10) spendable income figures, by that a estimated investment value, up and above the outstanding loan value. This is the price, which a prudent investor would pay for the income stream, to be received in the years stated on the chart.

I appreciate all of the information, which you furnished me, and all of information which I obtained from other sources I believe to be reliable, however, its ac-

curacy, correctness, completeness, etc., are not guaranteed by this firm.

The writer assumes no responsibility for items which are legal in nature.

I appreciate this opportunity to analyze these properties for you, and if I can be of any additional assistance, please do not hesitate to call on me.

Very truly yours,

REULE INVESTMENT COMPANY

/s/ David P. Reule

President

DPR/kag

Exhibit "C"

	Metelpel Products Building	Continental Systems Building
Appraisal of Mercer W. Simmons, MAI	$110,000.00	$360,000.00
Appraisal of Reule Investment Company	98,766.09	336,257.87
Balance of first Deed of Trust	53,385.98	233,419.59
Highest bid above balance of first Deed of Trust	43,500.00	75,000.00

	Tate Boulevard Property	Shopping Center Property
Appraisal of Mercer W. Simmons, MAI	$943,000.00	$250,000.00
Appraisal of Reule Investment Company	799,384.04	256,077.93
Balance of first Deed of Trust	779,310.55	180,541.75
Highest bid above balance of first Deed of Trust	100.00	28,000.00

639a

Total of balances of first Deeds of Trust	$ 1,246,657.87
Second Deed of Trust covering these four tracts	$ 360,000.00
Total of highest bids above balances of first Deeds of Trust	$ 146,600.00
Deficit on second Deed of Trust	$ - 213,400.00
Balance available to general creditors	$ -0-

640a

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

BANKRUPTCY NO. ST-B-73-6

JOE N. CAGLE, Trustee in Bankruptcy for Golden Enterprises, Inc., Plaintiff, vs. SHELBY SAVINGS & LOAN ASSOCIATION, et al.

ORDER

THIS CAUSE coming on to be heard and being heard before the undersigned U.S. Bankruptcy Judge upon motion of William E. Butner requesting an alteration or amendment to the Order of the Court entered August 11, 1975, confirming the sale of certain real estate of Golden Enterprises, Inc., and for a new hearing thereon, and after review and consideration of the Motion, the pleadings and affidavits on file, appraisals and other evidence, and due deliberation being had thereon, the Court hereby enters its findings and order as follows:

1. That Joe N. Cagle is the duly appointed, qualified and acting Trustee in Bankruptcy for Golden Enterprises, Inc., which was adjudged a bankrupt on February 14, 1975.

2. That the assets belonging to the estate of the Bankrupt and in the possession of the Trustee in Bankruptcy consist primarily of four tracts of real estate located in Catawba County, North Carolina.

3. That said four tracts of real estate are encumbered with outstanding first and second deeds of trust, which are all in default.

4. That an Order was heretofore entered in this cause on June 30, 1975, authorizing the Trustee in Bankruptcy to sell the real estate at public auction on the 28th day of July, 1975, free and clear of all liens and encumbrances except the first deeds of trust and the current year's ad valorem taxes, with the rights of all other lienholders and secured parties transferred to the proceeds of said sale for a deter-

mination and marshalling by the Court.

5. That the aforesaid Order entered by this Court on June 30, 1975, was not modified, amended, or stayed, and the said Order was not appealed by any party.

6. That the Trustee properly and adequately advertised the Bankruptcy Sale in the Hickory Daily Record and The Charlotte Observer in accordance with the Rules of Bankruptcy and the Order of this Court.

7. That the Bankruptcy Sale was held by the Trustee on July 28, 1975, and it was regular and proper in all respects.

8. That the Bankruptcy Sale was well attended and there was spirited competitive bidding on Tracts I and III, although, apparently, none of the second lienholders entered any bids.

9. That this Court is unable to find any irregularity in the proceedings heretofore set forth and further

finds no abuse of its discretion in ordering and confirming the same.

NOW, THEREFORE, IT IS ORDERED and DECREED as follows:

1. That the Motion to alter or amend the Confirmation Order of this Court entered August 11, 1975, is denied.

2. That the Motion for a new hearing on the Confirmation Order of this Court entered August 11, 1975, is denied.

3. That the Trustee is hereby directed to forthwith comply with the term of the Confirmation Order entered by this Court on August 11, 1975.

This the 29th day of August, 1975.

/s/ Joseph R. Cruciani

U. S. Bankruptcy Judge

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

MONTHLY FINANCIAL REPORT

September, 1975

645a

The undersigned Trustee submits the following report of receipts and disbursements in the month of September, 1975:

Cash Balance		$ 117,493.23
Rental Income Receipts:		
Capitol Credit (Sept. rent)	$ 350.00	
Beltone (Sept. rent)	538.87	

646a

Iron Gate Restaurant (Sept. rent)	652.44	
Frelon Broome Insurance (Sept. rent)	350.00	
PPV, Inc. (Sept. rent)	245.00	
C.I.T. Financial Services (Sept. rent)	487.50	
Superior Continental (Sept. rent)	5,540.62	
Metelpel (Sept. rent)	1,015.62	
Superior Continental (Sept. rent)	3,276.04	12,456.09
Total Cash		$129,949.32

Cash Disbursements:

Central Telephone Co.--Utility bill under lease	$ 6.00
Central Telephone Co.--Utility bill under lease	6.00
City of Hickory--Utility bill under lease	7.56

City of Hickory--Utility bill under lease	6.63	
City of Hickory--Utility bill under lease	6.63	
City of Hickory--Utility bill under lease	16.00	
Clerk of Superior Court--Photocopies	14.00	
Duke Power Company--Utility bill under lease	134.68	
Duke Power Company--Utility bill under lease	92.64	
Duke Power Company--Utility bill under lease	89.14	379.28
	Balance on Hand	$129,570.04

*Of the Balance on Hand, $129,000.00 is deposited in a Passbook Savings Account at North Carolina National Bank.

This is to certify that the above represents a true and accurate record of the receipts and disbursements of the undersigned Trustee during the month of September, 1975, in the above-referenced estate.

/s/ Joe N. Cagle, Trustee

P. O. Box 2050

Hickory, NC 28601

COUNSEL:

Joe N. Cagle, Attorney

CAGLE AND HOUCK

P. O. Box 2050

Fidelity Federal Building

Hickory, NC 28601

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648a

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

MONTHLY FINANCIAL REPORT

October, 1975

649a

The undersigned Trustee submits the following report of receipts and disbursements in the month of October, 1975:

Cash Balance		$ 129,570.04
Rental Income Receipts:		
Beltone (Oct. rent)	$ 538.87	
Superior Continental (Oct. rent)	5,540.62	

650a

Superior Continental (Oct. rent)	3,276.04	
Iron Gate Restaurant (Oct. rent)	652.44	
Capitol Credit (Oct. rent)	350.00	
C.I.T. Financial Services (Oct. rent)	487.50	
PPV, Inc. (Oct. rent)	245.00	
Metelpel (Oct. rent)	1,015.62	
Travel World (July, Aug., Sept., rent)	975.00	
Frelon Broome Insurance (Oct. rent)	350.00	13,431.09
	Total Cash	$143,001.13

Cash Disbursements:

Duke Power Company--Utility bill under lease	$ 81.63
Duke Power Company--Utility bill under lease	59.96

Duke Power Company--Utility bill under lease	114.60	
City of Hickory--Utility bill under lease	6.63	
City of Hickory--Utility bill under lease	6.63	
City of Hickory--Utility bill under lease	7.33	
City of Hickory--Utility bill under lease	16.00	
Central Telephone Co.--Utility bill under lease	6.00	298.78
	Balance on Hand	$142,702.35

651a

**Of the Balance on Hand, $100,000.00 is represented by a Certificate of Deposit at North Carolina National Bank and $42,000.00 (plus interest) is deposited in a Pass-book Savings Account at North Carolina National Bank.

This is to certify that the above represents a true and accurate record of the receipts and disbursements of the undersigned Trustee during the month of October, 1975, in the above-referenced Estate.

/s/ Joe N. Cagle, Trustee

P. O. Box 2050

Hickory, NC 28601

652a

COUNSEL:

Joe N. Cagle, Attorney

CAGLE AND HOUCK

P. O. Box 2050

Hickory, NC 28601

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

BANKRUPTCY NO. ST-B-73-6

JOE N. CAGLE, Trustee in Bankruptcy for Golden Enterprises, Inc., Bankrupt, Plaintiff, vs. SHELBY SAVINGS & LOAN ASSOCIATION and JOSEPH C. WHISNANT, as Trustee; THE FIRST NATIONAL BANK OF CATAWBA COUNTY and JAMES M. GAITHER, JR., as Trustee; FIDELITY FEDERAL SAVINGS AND LOAN ASSOCIATION and LEE DENNIS, as Trustee; W. E. BUTNER, ROBERT L. McKAUGHN, JR., JACK SIPE CONSTRUCTION CO., and J. CARROLL ABERNETHY, JR., as Trustee; EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA; CATAWBA COUNTY TAX COLLECTOR; and CITY OF HICKORY TAX COLLECTOR, Defendants.

ORDER

THIS CAUSE coming on to be heard before the undersigned U. S. District Court upon Appeal of William E.

Butner from the Confirmation Order of the U. S. Bankruptcy Judge entered on August 11, 1975, in the above-entitled proceeding and after a review of the Record, and having heard arguments of Counsel for William E. Butner, the Trustee in Bankruptcy, Shelby Savings and Loan Association, The First National Bank of Catawba County, and Fidelity Federal Savings and Loan Association, with due deliberation being had thereon, the Court hereby enters the following order:

1. That the finds of the U. S. Bankruptcy Judge are hereby adopted.

2. That all the Deeds of Trust on the Bankrupt's real estate have been in default for some length of time and the outstanding balances continue to increase, so that the apparent equity in said real estate is fast diminishing.

3. That the beneficiaries of the second Deed of Trust ought to be allowed to use the outstanding principal balance of said Deed of Trust to bid at any Bank-

ruptcy Sale held by the Trustee.

4. That it appears that the Trustee should resell the real estate under the terms of the prior Order of the U.S. Bankruptcy Judge, except that the beneficiaries of the second Deed of Trust should be allowed to bid with their Deed of Trust.

THEREFORE, IT IS ORDERED AND DECREED as follows:

1. That the Trustee be and he is hereby authorized to resell the real estate of the Bankrupt at public auction, free and clear of all liens and encumbrances except the first Deeds of Trust thereon in favor of Shelby Savings and Loan Association, The First National Bank of Catawba County, Fidelity Federal Savings and Loan Association, and the current year's ad valorem taxes, and that the sale be held on the 12th day of November, 1975, beginning at 10:00 o'clock a.m.

2. That the rights of all other lienholders and secured parties be transferred to the proceeds of said

sale for a determination and marshalling by the Court.

3. That the beneficiaries of the second Deed of Trust shall be allowed to use the outstanding principal balance of their Deed of Trust to bid at said Bankruptcy Resale;

4. That the Trustee be and he is hereby authorized to advertise the public sale of the real estate in a newspaper published in Catawba County, North Carolina, as he deems fit and such notice shall be deemed sufficient for all purposes hereunder.

5. If the proceeds of said sale are insufficient in amount to pay the principal balance of $360,000.00 outstanding on the second Deed of Trust or if the holders of the said second Deed of Trust are not the high bidders within the amount of said principal balance of said second Deed of Trust on all four tracts of land, then the Trustee shall forthwith abandon the said real estate.

6. That the said sale shall be final and not subject

to confirmation of the Court.

7. That the costs incidental to the prior sale and all costs incidental to this resale, be charged as a part of the costs of administration.

8. That the Confirmation Order of the U. S. Bankruptcy Judge entered on August 11, 1975, is hereby amended and modified to conform to the within orders and instructions.

9. That this proceeding is hereby remanded for further proceedings in accordance with the orders and instructions hereinabove set forth.

This the 7th day of November, 1975.

/s/ Woodrow W. Jones

Judge, U. S. District Court

November 20, 1975

The Honorable Joseph R. Cruciani

U. S. Bankruptcy Judge

P. O. Box 1109

Charlotte, NC 28231

Re: Golden Enterprises, Inc.

ST-B-73-6

Gentlemen:

Enclosed for filing in the Bankruptcy file for Golden Enterprises, Inc., are the following documents:

1. Copy of Trustee Deed from Joe N. Cagle, Trustee in Bankruptcy for Golden Enterprises, Inc., to William E. Butner and wife, Ann E. Butner, dated November 19, 1975, which Deed was recorded on November 20, 1975, at 11:55 a.m. in Deed Book 1083 at Page 1, Catawba County Registry.

2. Assignment from Jack Sipe Construction Company to William E. Butner and wife, Ann E. Butner.

3. Assignment from Robert L. McKaughn, Jr., to

William E. Butner and wife, Ann E. Butner

Since the District Court Order specified that the second mortgage holders could bid with their second mortgages, the enclosed Assignments reflect that Mr. Butner's high bids entitled him to the real estate. This was done because the apparent interests of the second mortgage holders were undivided on the public records.

Inasmuch as the Trustee received no cash from this transaction, we expended no funds for revenue stamps. Inasmuch as I deemed it an obligation on the Trustee to see that the Deed was recorded, I advanced the recording fee. I believe that this transaction completes the disposition of the Bankrupt's real estate.

Very truly yours,

CAGLE AND HOUCK

/s/ Joe N. Cagle

JNC: aa

Enclosures

NORTH CAROLINA)

) TRUSTEE DEED

CATAWBA COUNTY)

THIS DEED, made this 19th day of November, 1975, from JOE N. CAGLE, TRUSTEE IN BANKRUPTCY FOR GOLDEN ENTERPRISES, INC., (hereinafter sometimes called "Grantor") to WILLIAM E. BUTNER and wife, ANN E. BUTNER, whose address is P. O. Box 2323, Hickory, North Carolina, (hereinafter sometimes called "Grantees").

WITNESSETH:

THAT the Grantor is the duly appointed, qualified and acting Trustee in Bankruptcy for Golden Enterprises, Inc., which was adjudged a bankrupt on February 14, 1975, in Bankruptcy No. ST-B-73-6;

THAT the Order Approving Trustee's Bond was recorded on April 10, 1975, in Deed Book 1066 at Page 923, in the Office of the Register of Deeds for Catawba County, North Carolina;

THAT the said Trustee instituted Adversary Proceedings in the U. S. Bankruptcy Court on June 11, 1975, to sell the real estate hereinafter described free of certain liens;

THAT an Order was entered on June 30, 1975, by the U. S. Bankruptcy Judge authorizing the Trustee in Bankruptcy to sell the real estate at public auction on the 28th day of July, 1975, free and clear of all liens and encumbrances except the first deeds of trust and the current year's ad valorem taxes, with the rights of all other lienholders and secured parties transferred to the proceeds of said sale for a determination and marshalling by the Court.

THAT a public sale of the real estate hereinafter described was held by the Trustee on July 28, 1975, in accordance with the Rules of Bankruptcy and the aforesaid Order, and that a Confirmation Order was entered by the U. S. Bankruptcy Judge on August 11, 1975;

THAT William E. Butner appealed the aforesaid Confirmation Order to the U. S. District Court on August 19, 1975;

THAT an Order of the U. S. District Court was entered on November 7, 1975, authorizing the Trustee to resell the real estate hereinafter described upon the terms and conditions set forth in said Order, a copy of which is annexed hereto as Exhibit "A."

THAT a resale of the said real estate was held by the Trustee on November 12, 1975, in accordance with the said Order of the U. S. District Court, and the Grantees became the purchasers at said sale.

NOW, THEREFORE, in consideration of the premises and pursuant to the Order of the U. S. District Court dated November 7, 1975, the Grantor does hereby grant, bargain, sell and convey unto the Grantees, their heirs and assigns, the real estate located in Hickory Township, Catawba County, State of North Carolina, and described as follows:

TRACT I

BEGINNING at an iron pin in the southern margin of F Avenue, Southeast, said iron pin being located South 67° 39' East 150.0 feet from 15th Street, Southeast; thence from said beginning point with the southern margin of F Avenue, Southeast, South 67° 39' East 151.0 feet to an old iron pin, C. W. Fox's Northwest corner; thence with Fox's line South 7° 58' West 289.56 feet to an old iron pin, a corner of S. E. Price; thence with Price's line North 51° 55' West 27.9 feet to an old iron pin; thence continuing with Price's line North 68° 29' West 198.3 feet to an old iron pin; thence North 22° 48' East 275.85 feet to the point or place of BEGINNING. The same being all of Lots 12 through 17, inclusive, in Block "B" of the St. Stephens Lutheran Church property as shown on a plat thereof recorded in Plat Book 7 at Page 126, in the Catawba County Public Registry.

Together with all the buildings and improvements thereon, and all rights, easements, hereditaments and

thereon, and all rights, easements, hereditaments and appurtenances thereunto belonging.

For partial chain of title see Deed Book 927 at Page 208, in the Office of the Register of Deeds for Catawba County. See also Tax Map 60H-4-26.

This conveyance is made subject to all existing and recorded rights of way and easements for streets, highways and public utilities, if any, affecting said property.

This tract is hereby conveyed subject to the outstanding Deed of Trust in favor of The First National Bank of Catawba County, dated February 19, 1971, in the original amount of $74,000.00, as described in Deed Book 967 at Page 160, Catawba County Registry, and the current year's property taxes.

TRACT II

BEGINNING at an iron stake in the eastern margin of Fourth Street, S. W., immediately adjoining a stone wall of the Ridgeview Cemetery, and running thence

with the margin of said street North 18° 06' West 33.47 feet to an iron stake; thence continuing with said margin North 1° 35' West 90.12 feet to an iron stake; thence continuing with said margin North 8° 51' East 175.02 feet to an iron stake, the southwestern corner of the property sold from the City of Hickory to Superior Automobile Insurance Company (occupied by Stephenson Finance Company); thence with Superior southern line North 79° 46' 40" East 148.41 feet to an iron stake in the western line of Elijah Covington (A. H. Field); thence with Covington's western line and the western line of Dr. R. W. Carver, South 24° 46' East 227.63 feet to an iron stake in Carver's line; thence with the line of Ridgeview Cemetery South 65° 52' West 279.82 feet to the point of BEGINNING, containing 1.29 acres, more or less. This description was taken from a survey by the City of Hickory Engineering Department on September 9, 1966.

Together with all the buildings and improvements

thereon, and all rights, easements, hereditaments and appurtenances thereunto belonging.

For partial chain of title see Deed Book 986 at Page 421, in the Office of the Register of Deeds for Catawba County. See also Tax Map 43H-10-36B.

This conveyance is made subject to all existing and recorded rights of way and easements for streets, highways and public utilities, if any, affecting said property.

This tract is hereby conveyed subject to the outstanding Deed of Trust in favor of Fidelity Federal Savings and Loan Association, dated August 11, 1972, in the original amount of $200,000.00, as described in Deed Book 1005 at Page 495, Catawba County Registry, and the current year's property taxes.

TRACT III

BEGINNING at an iron stake, the northeast corner of the property owned by Martel Company and running thence with the northern line of said Martel Company

North 86° 24' West for 427.69 feet to an iron pin located in the eastern margin of the right of way of Little Street, now State Road No. 1653; thence with the eastern margin of the right of way of Little Street for the following calls and distances: North 1° 02' West for 340.36 feet to an iron sta; e thence North 1° 38' West for 154.80 feet to an iron stake; thence along a curve, the eastern margin of said road, whose cord is 156.23 feet; cord bearing North 6° 05' West to an iron stake located in the western margin of a 20-foot road, the old line, said corner being 331 feet South of the center line of "C" Avenue, S. E.; thence with the old line, the western margin of a 20-foot road, South 33° 50' East for 814.83 feet to the point of BEGINNING and containing 3.11 acres, according to a plat of a survey made by Donald S. Miller, Registered Surveyor, of the John S. Little Estate made in December of 1969. Together with all the buildings and improvements thereon, and all rights, easements, hereditaments

and appurtenances thereunto belonging.

For partial chain of title see Deed Book 947 at Page 415, in the Office of the Register of Deeds for Catawba County. See also Tax Map 59H-1-3.

This conveyance is made subject to all existing and recorded rights of way and easements for streets, highways and public utilities, if any, affecting said property.

This tract is hereby conveyed subject to the outstanding Deed of Trust in favor of Shelby Savings and Loan Association, dated February 11, 1971, in the original amount of $260,000.00, as described in Deed Book 967 at Page 28, Catawba County Registry, and the current year's property taxes.

TRACT IV

A. BEGINNING at an iron pin, said pin being the Southwest corner of Tract No. 5 of the Walton C. Yount Estate property as recorded in Plat Book 3, Page 81, Catawba County Registry, and being located North 46° 46' West

150 feet from the center of 3rd Avenue Drive, S. E.; thence from said point of Beginning, North 61° 47' East 416.7 feet to a point in the John S. Little Estate property line; thence leaving the John S. Little Estate property line and establishing a new line, South 70° 30' East 150.31 feet; thence North 36° 36' East 17.46 feet; thence South 53° 24' East 56.75 feet; thence South 70° 30' East 402.05 feet to a point in Lot No. 3 of the Walton C. Yount Estate property, now owned by Regal Manufacturing Company; thence with the line of Regal Manufacturing Company, South 35° 39' West 392.16 feet to an iron pin in the line of Lot No. 5 of the Young property, the Southwest corner of Tract No. 3 of the Yount property; thence South 69° West 152.93 feet to an iron pin; thence South 58° West 135 feet to an iron pin in the South line of Tract No. 5 of the Walton C. Yount Estate property; thence North 46° 46' West 487 feet to an iron pin in the middle of 3rd Avenue Drive, S. E.; thence continuing the same call

150 feet to the point of BEGINNING. Being Lot No. 4 (excepting Tate Boulevard) and the Northwest portion of Lot No. 5 of the Walton C. Yount Estate Property. Being also Tract No. I and a portion of Tract No. III of the property of Golden Enterprises, Inc., as surveyed by Marion E. Bolch, Registered Surveyor, on May 12, 1972.

B. BEGINNING at an iron pin, said pin being the Southwest corner of Tract No. 3 and the Southeast corner of Tract No. 4 of the Walton C. Yount Estate property as shown in Plat Book 3 at Page 81, Catawba County Registry, and running thence from said point of Beginning South 69° West 152.93 feet to an iron pin; thence South 58° West 135 feet to an iron pin in the line of Avery Yount, Tract No. 6 of the plat herein referred to; thence South 46° 46' East 840 feet to an iron pin, the Southeast corner of this tract; thence North 20° 11' East 375 feet to an iron pin, said pin being the Southeast corner of Tract 5 of the Walton C. Yount

property; thence with the southern line of Tract No. 3 of the Walton C. Yount property, North 54° 47' West 593 feet to the point of BEGINNING.

C. BEGINNING at an iron pin in the southern margin of the right of way of Tate Boulevard, said pin being located North 61° 47' East 431 feet from the Southwest corner of Tract No. 4 of the Walton C. Yount property, as recorded in Plat Book 3 at Page 81, Catawba County Registry, and running thence from said point of Beginning, South 61° 47' West with the John S. Little Estate property line 250 feet to a point in said line; thence leaving the Little line and establishing a new line that runs with Tract No. IV-A, supra, South 70° 30' East 608 feet, more or less, to a point in the line of Tract No. 3 of the Walton C. Young property, now owned by Regal Manufacturing Company; thence with the line of Regal Manufacturing Company North 35° 39' East 250 feet to an iron pin; thence North 59° 33' West 70 feet, more or less, to a point; thence with the

southern right of way of Tate Boulevard North 79° 17' West 450 feet, more or less, to the point of BEGINNING.

Together with all the buildings and improvements thereon, and all rights, easements, hereditaments and appurtenances thereunto belonging.

For partial chain of title see Deed Book 990 at Page 629, in the Office of the Register of Deeds for Catawba County. See also Tax Map 60H-1-11.

This conveyance is made subject to all existing and recorded rights of way and easements for streets, highways and public utilities, if any, affecting said property.

This tract is hereby conveyed subject to the outstanding Deed of Trust in favor of Shelby Savings and Loan Association, dated April 2, 1973, in the original amount of $755,000.00, as described in Deed Book 1020 at Page 660, Catawba County Registry, and the current year's property taxes.

The accrued rents and the right to collect unpaid

accrued rents from the above-described tracts of real estate are hereby expressly not conveyed, but are reserved to the Grantor.

TO HAVE AND TO HOLD the aforesaid tracts or parcels of land and all privileges and appurtenances thereunto belonging or in anywise appertaining, to the said Grantees, their heirs and assigns, to their only use and behoof in fee simple forever, in as full and ample a manner as the said Trustee has power to convey the same.

IN WITNESS WHEREOF, the said Joe N. Cagle, acting as Trustee in Bankruptcy for Golden Enterprises, Inc., as hereinabove stated, has hereunto set his hand and affixed his seal, the day and year first above written.

/s/ Joe N. Cagle, Trustee in Bankruptcy for
Golden Enterprises, Inc.

(Acknowledgment omitted in printing)

(Certificate of Registration omitted in printing)

NORTH CAROLINA)
)ASSIGNMENT
CATAWBA COUNTY)

THIS ASSIGNMENT, made and entered into this the 12th day of November, 1975, by and between JACK SIPE CONSTRUCTION COMPANY, a corporation organized and existing under and by virtue of the laws of the State of North Carolina, and having its principal place of business in Hickory, North Carolina, hereinafter referred to as Party of the First Part, and WILLIAM E. BUTNER and wife, ANN E. BUTNER, of Hickory, Catawba County, North Carolina, hereinafter referred to as Parties of the Second Part:

WITNESSETH:

That for and in consideration of the mutual covenants contained herein and the further sum of ONE HUNDRED DOLLARS ($100.00) paid by the Parties of the Second Part to the Party of the First Part, the receipt of which is hereby acknow-

ledged, the parties hereto contract and agree as follows:

1. That Jack Sipe Construction Company and William E. Butner are holders of a deed of trust on four tracts or parcels of land located in Hickory Township, Catawba County, North Carolina, in the original amount of $360,000.00, dated July 1, 1974, and recorded in Book 1051 at Page 184, of the Catawba County Registry, to which said deed of trust reference is hereby expressly made for particularity.

2. That the property described in the above-referenced deed of trust was sold at a public bankruptcy sale at 10:00 a.m., November 12, 1975, at Fidelity Federal Savings and Loan Building located on First Avenue, N.E., Hickory, North Carolina, pursuant to the Order of the Honorable Woodrow W. Jones, Federal District Judge, dated November 7, 1975.

3. That the Party of the First Part hereby assigns to William E. Butner, and wife, Ann E. Butner, all of its right, title and interest whatsoever arising out of or through that indebtedness and deed of trust hereinabove referred to having an original balance of $360,000.00, dated July 1, 1974, and recorded in Book 1051 at Page 184 of the Catawba County Registry.

4. That simultaneously with the execution of this Assignment, the Parties of the Second Part shall pay to the Party of the First Part the sum of $10,000.00 in cash and in addition thereto the Parties of the Second Part shall execute and deliver to the Party of the First Part a promissory note for $42,200.00, bearing no interest, and being due and payable on or before December 27, 1975.

5. That the Parties of the Second Part shall convey to the Party of the First Part that building and premises located at 25 First Avenue, N.E. in

the City of Hickory, North Carolina, commonly referred to as the "Social Security Building," by Warranty Deed, subject to existing encumbrances of record, with the Party of the First Part as of December 28, 1975, assuming and agreeing to pay and save the Parties of the Second Part harmless from any and all liability arising out of or through that indebtedness to Fidelity Federal Savings & Loan Association, secured by that Deed of Trust dated February 28, 1975, in the original amount of $110,000.00 and being recorded in Book 1064 at Page 380 of the Catawba County Registry, PROVIDED, HOWEVER, that upon payment by the Parties of the Second Part to the Party of the First Part of $42,200.00 on or before December 27, 1975, the Party of the First Part shall immediately reconvey to the Parties of the Second Part said land and premises, subject to no more encumbrances than shall exist as of this date. That in the event the

Parties of the Second Part do not pay to the Party of the First Part the sum of $42,200.00 on or before December 27, 1975, the conveyance of the said "Social Security Building" shall be a total and complete satisfaction of any and all claims by the Party of the First Part against the Parties of the Second Part arising out of or through this Assignment of interest in the indebtedness and the Deed of Trust in the original sum of $360,000.00 dated July 1, 1974, and recorded in Book 1051 at Page 184 of the Catawba County Registry.

6. That the said "Social Security Building," located at 25 First Avenue, N. E. in the City of Hickory, North Carolina, is now subject to the following encumbrances:

(1) 1975 City and County ad valorem taxes.

(2) Deed of Trust to Fidelity Federal Savings and Loan Association in the original amount of $110,000.00, dated Feb-

ruary 28, 1975, of record in Book 1064 at Page 380 of the Catawba County Registry, now having a present outstanding balance of $107,756.43 and monthly payments of $1,148.66, with an interest rate of 9-1/2%.

(3) Deed of Trust to North Carolina National Bank dated March 3, 1975, in the original sum of $20,000.00, of record in Book 1064 at Page 475 of the Catawba County Registry, and having a present outstanding balance of $15,000.00, with quarterly payments of $5,000.00 plus interest at 1% over the prime rate.

(4) Lease in favor of the United States Government, General Services Administration.

7. That the Parties of the Second Part will save the Party of the First Part harmless from

any and all liability arising out of or through that certain Lease Agreement, as amended, executed by Robert L. McKaughn, Jr., William E. Butner, and Jack Sipe Construction Company in favor of Golden Enterprises, Inc. of those premises located at 1120 Tate Boulevard, Hickory, North Carolina, dated March 1, 1974, a memorandum of which is recorded in Book 1046 at Page 263 of the Catawba County Registry.

8. That the building known as the "Social Security Building" is now subject to a Lease Agreement in favor of the United States Government, General Services Administration, numbered GS-04B-11434, as extended by that Extension Rental Agreement dated October 20, 1971, for a term through and including January 31, 1977, at a monthly rental of $1,459.58 plus approximately $40.00 per month payment for overtime work of the Social Security Administration performed in said

building.

9. That neither the Parties of the Second Part, nor any agent of said Parties of the Second Part, shall contest the priority of the claim of the Party of the First Part arising out of its installation of a sprinkler system in the warehouse facility located at 1120 Tate Boulevard, Hickory, North Carolina, said property being more particularly described in that deed of trust dated April 2, 1973, and recorded in Book 1020 at Page 660 of the Catawba County Registry, to which reference is hereby expressly made for particularity of description, in that bankruptcy proceeding involving Golden Enterprises, Inc. now pending in the Bankruptcy Court for the Western District for North Carolina, bearing Bankruptcy No. ST-B-73-6.

10. That this agreement by the parties hereto is expressly conditioned upon the said Parties of the Second Part being conveyed title to the real

estate as described in that deed of trust dated July 1, 1974, and recorded in Book 1051 at Page 184 of the Catawba County Registry immediately by the Trustee in Bankruptcy for Golden Enterprises, Inc.

11. That the Parties of the Second Part shall pay 1975 City and County ad valorem taxes, and shall bring the deed of trust to Fidelity Federal Savings and Loan Association recorded in Book 1064 at Page 380 and the deed of trust to North Carolina National Bank recorded in Book 1064 at Page 475 current through and including December 27, 1975.

12. That in the event of a foreclosure by North Carolina National Bank of that deed of trust dated March 3, 1975, in the original sum of $20,000.00, of record in Book 1064 at Page 475 of the Catawba County Registry, prior to December 28, 1975, that the Parties of the Second Part shall pay the Trustee's commission and the court costs

of such a foreclosure.

13. That the Parties of the Second Part shall be entitled to the rental proceeds of the said "Social Security Building" and shall be responsible for utility and maintenance expenditures through and including December 27, 1975.

The parties hereto have executed this Agreement in duplicate originals, a copy of which is retained by each of the parties hereto, this the 12th day of November, 1975.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals.

Party of the First Part	Parties of the Second Part
JACK SIPE CONSTRUC-	
TION COMPANY	/s/ William E. Butner (SEAL)
by /s/ R.G.Sipe	
President	/s/ Ann E. Butner(SEAL)
Attest:	
/s/Margaret T. Sipe ,Secretary	

(Corporate Seal)

(Acknowledgements omitted in printing)

NORTH CAROLINA)
) ASSIGNMENT
CATAWBA COUNTY)

THIS ASSIGNMENT, made and entered into this the 12th day of November, 1975, by and between ROBERT L. McKAUGHN, JR. of Hickory, Catawba County, North Carolina, hereinafter referred to as Party of the First Part, and WILLIAM E. BUTNER and wife, ANN E. BUTNER, of Hickory, Catawba County, North Carolina, hereinafter referred to as Parties of the Second Part:

WITNESSETH:

That for and in consideration of the mutual covenants contained herein and the further sum of ONE HUNDRED DOLLARS ($100.00) paid by the Parties of the Second Part to the Party of the First Part, the receipt of which is hereby acknowledged, the parties hereto contract and agree as follows:

1. That Robert L. McKaughn, Jr. and

William E. Butner are holders of deeds of trust on four tracts or parcels of land located in Hickory Township, Catawba County, North Carolina in the original amounts of $250,000.00 and $360,000.00, dated March 13, 1973 and July 1, 1974 and recorded in Book 1018 at page 788 and Book 1051 at page 184, respectively of the Catawba County Registry, to which said deeds of trust reference is hereby expressly made for particularity.

2. That the property described in the above-referenced deeds of trust was sold at public bankruptcy sale at 10:00 a.m., November 12, 1975, at Fidelity Federal Savings and Loan Building located on First Avenue, N.E., Hickory, North Carolina pursuant to the Order of the Honorable Woodrow W. Jones, Federal District Judge, dated November 7, 1975.

3. That for and in consideration of William E. Butner's agreeing to assume and pay $120,000.00

of that certain note in the original amount of $150,000.00, given jointly by William E. Butner and Robert L. McKaughn, Jr. to the Bank of Granite, Hickory, North Carolina, that the Party of the First Part hereby assigns to William E. Butner and wife, Ann E. Butner, all of his right, title and interest whatsoever arising out of or through those indebtednesses and deeds of trust hereinbefore referred to having original balances of $250,000.00 and $360,000.00, dated March 13, 1973 and July 1, 1974, and recorded in Book 1018 at page 788 and Book 1051 at page 184 respectively of the Catawba County Registry.

4. That this agreement by the parties hereto is expressly conditioned upon the said Parties of the Second Part being conveyed title to the real estate as described in those deeds of trust dated March 13, 1973 and July 1, 1974 and recorded in Book 1018 at page 788 and Book 1051 at page 184

respectively of the Catawba County Registry immediately by the Trustee in Bankruptcy for Golden Enterprises, Inc. and without delay as a result of appeal or otherwise.

The parties hereto have executed this Assignment in duplicate originals, a copy of which is retained by each of the parties hereto, this the 12th day of November, 1975.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals.

PARTY OF THE FIRST PART

/s/Robert L. McKaughn, Jr. (SEAL)

PARTIES OF THE SECOND PART

/s/ William E. Butner (SEAL)

/s/ Ann E. Butner (SEAL)

(Acknowledgements omitted in printing)

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption Omitted in Printing)

MOTION FOR DISTRIBUTION OF FUNDS

NOW COMES William E. Butner, by and through his undersigned attorney of record, and respectfully shows unto the Court and moves the Court as follows:

I.

Whereas, Golden Enterprises, Inc. was adjudicated bankrupt on February 14, 1975.

II.

That as of February 14, 1975, Jack Sipe Construction Company, Robert L. McKaughn, Jr., and William E. Butner were holders of valid second mortgages on the real property then owned by Golden Enterprises, Inc., consisting of four tracts or parcels more particularly described in that Trus-

tee's Deed dated November 19, 1975, from Joe N. Cagle, Trustee in Bankruptcy for Golden Enterprises, Inc., to William E. Butner and wife, Ann E. Butner, to which reference is hereby expressly made for particularity of description. That on or about the 12th day of November, 1975, Robert L. McKaughn, Jr. and Jack Sipe Construction Company assigned all of their right, title and interest whatsoever arising out of or through those second mortgages hereinabove described to William E. Butner and wife, Ann E. Butner.

III.

That the above-mentioned Trustee's Deed resulted from that resale of the property by virtue of the Order of the Honorable Woodrow W. Jones, Judge, United States District Court, dated November 7, 1975, in which said Order Judge Jones found as a fact that all deeds of trust on the real estate in question had been in default for some length of

time and the outstanding balances were continuing to increase.

IV.

That since the adjudication of straight bankruptcy as to Golden Enterprises, Inc. on February 14, 1975, the Trustee has been accumulating all rents and profits from the above-described real property, and you movant alleges upon information and belief that the Trustee is now holding in excess of $150,000.00 as a result therefrom.

V.

That the first mortgages on the above-described property have been in default for a considerable period of time and that the institutions holding these deeds of trust are required to bring their accounts current by federal regulation before December 31, 1975.

VI.

That title to the above-described real property,

subject to the above-mentioned first deeds of trust, was conveyed to William E. Butner and wife, Ann E. Butner, by that Trustee's Deed dated November 19, 1975, from Joe N. Cagle, Trustee in Bankruptcy for Golden Enterprises, Inc., which said Trustee's Deed was properly recorded in Book 1083 at Page 1 of the Catawba County Registry, to which said deed reference is hereby expressly made for particularity of description. That as secured creditor and valid holder of all right, title and interest to the second mortgages hereinabove referred to, your movant is entitled to a substantial portion of those accumulated rents and profits now held by the Honorable Joe N. Cagle, Trustee in Bankruptcy, and as second mortgagee, his secured interest entitles your movant to a prompt distribution of these funds to said second mortgagee, so as to enable him to bring current the first mortgages which are now in default, and without a prompt distribution of

those funds to the second mortgagee, the secured interest of the said William E. Butner will be substantially and irreparably damaged and diminished; that justice and equity and the spirit and purpose of the Federal Bankruptcy Act require a prompt distribution of those funds now held by the Trustee, so as to avoid further substantial losses to the secured creditors, both first and second mortgagees, in the above-entitled matter.

WHEREFORE, your movant respectfully prays the Court as follows:

1. That a hearing be had within the first two weeks of December, 1975, at which time a determination be made as to the respective interests of all concerned parties in and to those funds now held by the Honorable Joe N. Cagle, Trustee in Bankruptcy.

2. That the proper portion of those funds be immediately disbursed to your movant.

3. For such other and further relief as to the Court may seem just and proper.

This 25th day of November, 1975.

BUTNER, RUDISILL & BRACKETT

Post Office Box 2323

Hickory, North Carolina 28601

By /s/ J. Richardson Rudisill, Jr.

(Verification omitted in printing)

(Jurat omitted in printing)

(Certificate of Service omitted in printing)

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

MONTHLY FINANCIAL REPORT

November, 1975

6952

The undersigned Trustee submits the following report of receipts and disbursements in the month of November, 1975:

Cash Balance		$ 142,702.35
Rental Income Receipts:		
Superior Continental (Nov. rent)	$ 5,540.62	
Beltone (Nov. rent)	538.87	
Iron Gate Restaurant (Nov. rent)	652.44	
Superior Continental (Nov. rent)	3,276.04	
Metelpel (Nov. rent)	1,015.62	
CIT Financial Corp. (Nov. rent)	487.50	
PPV, Inc. (Nov. rent)	245.00	
Frelon Broome Insurance Co. (Nov. rent)	350.00	
Capital Credit Corp. (Nov. rent)	350.00	12,456.09
	Total Cash	$155,158.44

6968

Cash Disbursements:

Duke Power Company--Utility bill under lease	$ 47.86
Duke Power Company--Utility bill under lease	80.55
Duke Power Company--Utility bill under lease	131.79

City of Hickory--Utility bill under lease	6.63	
City of Hickory--Utility bill under lease	16.00	
City of Hickory--Utility bill under lease	6.63	
City of Hickory--Utility bill under lease	6.63	
Hickory Daily Record--Advertisement of resale	61.60	
Central Telephone Co.--Utility bill under lease	6.00	
Register of Deeds-Recording Deed ot W.E. Butner and wife	8.50	372.10
	Balance on Hand	$154,786.34

**Of the Balance on Hand, $100,000.00 is represented by a Certificate of Deposit at North Carolina National Bank and $54,000.00 (Plus Interest) is deposited in a Passbook Savings Account at North Carolina National Bank.

697a

This is to certify that the above represents a true and accurate record of the receipts and disbursements of the undersigned Trustee during the month of November, 1975, in the above-referenced Estate.

/s/ Joe N. Cagle, Trustee

P. O. Box 2050

Hickory, NC 28601

698a

COUNSEL:

Joe N. Cagle, Attorney

CAGLE AND HOUCK

P. O. Box 2050

Hickory. NC 28601

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption Omitted in Printing)

PETITION FOR ATTORNEY'S FEES

The undersigned Attorney hereby petitions the Court for an allowance of compensation for professional services rendered to and for the Trustee in Bankruptcy for Golden Enterprises, Inc., and respectfully shows unto the Court as follows:

I.

That Golden Enterprises, Inc., was adjudged a bankrupt on February 14, 1975, and Joe N. Cagle is the duly appointed and acting Trustee in Bankruptcy for said Bankrupt.

II.

That the undersigned was authorized by Order of the Court dated February 25, 1975, to act as Attorney for the said Trustee in Bankruptcy and the

undersigned has served as Attorney for the Trustee since February 25, 1975.

III.

That the legal services for which compensation is herein requested were performed for and on behalf of the Trustee, and not on behalf of any committee, creditor, or any other person. The said services include the following:

Date	Services Rendered	Hours
3/10/75	Conferences with Attorney for Bankrupt to review files, deeds, leases, etc.	3
3/11/75	Conferences with Attorney for Bankrupt to review his files, correspondence, deeds, leases, etc.	5
3/12/75	Showed Integon and Capitol Finance the spaces in the Shopping Center.	2
3/13/75	Title examination in the Register	8

	of Deeds Office.	
3/14/75	Title examination in the Register of Deeds Office.	8
3/14/75	Telephone call from Capitol re prospective lease in Shopping Center.	.5
3/17/75	Telephone negotiations with Capitol re prospective lease.	.5
3/18/75	Call from Attorney for Bankrupt --obtained copy of plans of Shopping Center from Fidelity Federal and reviewed them with prospective tenants, including Capitol Credit and Integon Life Insurance Company.	1.5
3/20/75	Met with Capitol Credit at Shopping Center re proposed lease.	.5
3/20/75	Went to Shopping Center and showed Capitol Credit the vacant spaces.	1

3/20/75	Negotiations in office re prospective lease to Capitol.	1
3/21/75	Attorney William J. Houck of Cagle and Houck met with Capitol finance for one hour (at 2:00 p.m. until 3:00 p.m.) to show them premises again.	1
3/25/75	Review assets schedule filed by Attorney for Bankrupt.	1
3/25/75	Telephone call to attorney for second mortgage holders.	1
3/25/75	Title examination.	2
3/25/75	Conference with Fidelity Federal regarding their position as mortgage holder in this bankruptcy.	1
3/25/75	Conference with The First National Bank of Catawba County regarding their status as mortgage holder in this bankruptcy.	1

3/25/75	Telephone call to U.S. Bankruptcy Office to request certified copy of Order of Appointment and approval of Bond to file in Register of Deeds Office.	.1
3/26/75	Letter to Internal Revenue Service in Greensboro regarding First Meeting of Creditors. Carbon copy to local division.	1
3/26/75	Letter to Bekins Moving & Storage Co., regarding their notice of legal sale. Carbon copy to Joseph R. Cruciani.	1
3/27/75	Conference in office with officials of Capitol Credit to negotiate final terms of a proposed lease of space in Golden Shopping Center.	1
3/27/75	Review asset schedule filed by	1

	Debtor's Attorney.	
3/27/75	Title examination.	4
3/28/75	Drafting proposed lease with Capitol Credit.	1
3/28/75	Drafting Petition for Authorization to Enter into Lease.	1
3/28/75	Drafting Order for Authorization to Enter into Lease.	1
3/28/75	Telephone call from Attorney Grover Perrique who represents Bekins in California.	.5
3/31/75	Showed office space to prospective tenant--Alcohol Rehabilitation Center.	1
4/1/75	Work on inventory.	1
4/1/75	Telephone conversation with James Gaither, Attorney for Bankrupt.	1
4/1/75	Showed office space in Shop-	1

	ping Center to Frelon Broome.	
4/2/75	Telephone conversation with James Gaither, Attorney for Bankrupt--work on inventory.	3
4/2/75	Letter to Metelpel Products, Inc., regarding rental payments. Carbon copies to The First National Bank of Catawba County and Attorney Bill Sigmon.	.1
4/2/75	Letter to The First National Bank of Catawba County regarding rental payments of Metelpel Products, Inc. Carbon copy to Bill Sigmon.	.1
4/3/75	Drafted Trustee's Inventory and forwarded to U. S. Bankruptcy Office with letter. Carbon to Attorney James Gaither.	2-3
4/10/75	Recorded Approval of Bond in Register of Deed Office for Ca-	.5

	tawba County.	
4/11/75	Telephone call to Attorney Grover Perrique who represents Bekins of California.	.5
4/14/75	Conference with Capitol Credit to enter into lease of space in Shopping Center.	.5
4/14/75	Conference with N. C. Department of Revenue man to review records of Bankrupt.	2
4/14/75	Conference with Attorney for The First National Bank of Catawba County, first mortgage holder.	1
4/15/75	Talked to man from McDonald's regarding a proposed lease.	.5
4/15/75	Talked to attorney representing second mortgage lien.	.5
4/15/75	Drafted Petition for Authorization	1.5

	of Trustee to Enter into Lease and Order for Authorization of Trustee to Lease property to Frelon Broome, Ins. Agency.	
4/16/75	Hearing in Statesville all afternoon--first meeting of creditors.	2
4/17/75	Telephone call with David Reulle.	1
	Telephone call with Frelon Broome regarding proposed lease of space in Shopping Center.	
4/17/75	Telephone call with City Engineer re right of way across Tate Boulevard property.	.5
4/17/75	Office conference with one of the second mortgage holders.	3
4/18/75	Conference with Attorney Butner and Attorney James Gaither. Research of Bankruptcy Rules regarding Bankruptcy Sales and procedure	3

	to follow to sell real estate free of certain liens.	
4/22/75	Telephone call with Mrs. Harris at Bankruptcy Office.	.5
4/24/75	Preparation of Order waiving appraisals.	1
4/28/75	Preparation of lease to Frelon Broome Ins. Agency.	2
4/29/75	Letters to three creditors: Deason Termite concerning an invoice; City of Hickory Tax Collector regarding notice of tax advertisement; and Tax Assessor for Los Angeles, California, regarding filing Report.	2
5/75	Correspondence with creditors including Bekins and The First National Bank of Catawba County.	1
5/75	Review Complaint of FCB and	2

signed Consent Judgment.

6/5-6/75 Prepared Complaint to sell real estate. 4

6/6/75 Prepared Order reducing time to file Answer to Complaint. 1

6/9/75 Sent to U.S. Bankruptcy Office. .5

6/16/75 Prepared Acceptance of Service and service of Complaint, Order and Summons on Defendant. Conferences with Defendants to accept service. 3

6/30/75 Hearing on Complaint to sell realty. 1

7/1/75 Telephone calls to Attorney for Bekins re procedure to let him have assets in California. .5

7/16/75 Preparation of advertisements of sale and services regarding publication thereof. Prep-

aration of brochure or summary of details pertaining to the real estate to be sold, which were distributed to interested persons.

7/21/75 Rented space to McDonald's franchise--Prepared Petition and proposed Order. 1

7/28/75 Sale--certain legal opinions or decisions were necessary in connection with sale. After sale, I met with the holders of the second Deed of Trust. 6

7/29/75 Confirmation Hearing before U.S. Bankruptcy Judge in Charlotte, where the second mortgage holders objected to confirmation. 2

7/29/75 Met separately with at- 1

	torney for second mortgage holders after Confirmation hearing.	
7/29/75	Telephone conferences with officials of tenants in possession of real estate of Golden Enterprises, Inc., regarding their status.	.5
7/29/75	Letters to the highest bidders on Tracts III and IV to return their checks and notify them that their bids were not confirmed.	1
7/30/75	Drafting lease to PPV, Inc., for Shopping Center lease.	1
7/30/75	Drafting on Confirmation Order.	2
7/31/75	Met with W. E. Butner and his representatives regard-	1

	ing status of real estate of Bankrupt.	
8/1/75	Preparation of Affidavit regarding ads for the Bankruptcy Sale and filing same with U.S. Bankruptcy Court.	1
8/1/75	Conference with PPV, Inc., to review and execute lease for space in Shopping Center.	1
8/1/75	Conference with Robert L. McKaughn, Jr., one of the second mortgage holders regarding status of Bankruptcy Sale and real estate of the Bankrupt.	1
8/2/75	Preparation of final draft of Confirmation Order and sent to U.S. Bankruptcy Court for filing.	2

8/4/75	Telephone conference with Attorney William E. Butner regarding status of Confirmation Order and real estate of the Bankrupt.	.5
8/4/75	Met with officials of Fidelity Federal Savings and Loan, first mortgage holder on the Shopping Center regarding status of Bankruptcy Sale and real estate of the Bankrupt.	.5
8/4/75	Moved records of Bankrupt from office space which was rented to PPV, Inc. Moved records into the one remaining space in the said Shopping Center.	2
8/8/75	Talked with Maurice Capps, CPA regarding legal status of real estate, including negotiations.	.5

8/8/75	Conference with Attorney for second mortgage holder.	.25
8/11/75	Conference with second mortgage holder (W. E. Butner) regarding private bids on real estate.	.5
8/12/75	One-half hour office conference with Howard Propst re Shopping Center.	.5
8/13/75	Telephone call from Charles Dixon re Tract IV leases.	.5
8/13/75	Telephone call from H. D. Frye regarding bidding, received bid of $225,000.00 on Shopping Center.	.1
8/15/75	Thirty minute meeting with Howard Propst re status of shopping center and negotiations for bid.	.5
8/18/75	Telephone call from Bob McKaughn	.1

re status of Bankruptcy Sale.

8/19/75 Telephone call from Bowman Investment Company re legal status of his bid. .1

8/20/75 Telephone calls from Maurice Capps and W. E. Butner re status of Bankruptcy Sale and negotiations for bids. .2

8/20/75 Review Appeal Notice and Motion and Brief for alteration of Judgment and Rehearing. Review legal status with Judd Lawing, CPA. 2

8/21/75 Telephone call from Howard Propst re bids-$231,000.00. .25

8/21/75 Telephone call from H. D. Frye re bids-$227,000.00. .25

8/21/75 Telephone call from Bank of Granite re status of Bankrupt-

cy Sale.

8/22/75 Meeting with Jack Sipe Construction Co. and W. E. Butner re bids on Tract IV. 1

8/23/75 Preparation of Petition to send off bids to U.S. Bankruptcy Court. 2

8/25/75 Telephone call from Bowman Investment Company regarding status of the Bankruptcy Sale. .1

8/25/75 Telephone call from Marice Capps re status of Shopping Center bids. .1

8/25/75 Conference with Attorney W. E. Butner regarding status of proceedings. .1

8/25/75 Telephone call from Robert L. McKaughn, Jr., regarding status of proceedings. .1

8/27-28/75	Preparation and drafting proposed Order to deny W. E. Butner's Motions.	3
9/2/75	Review of Stay Order signed by Woodrow W. Jones, setting a hearing on September 5, 1975.	.5
9/5/75	Hearing in Rutherfordton before Woodrow W. Jones on request by W. E. Butner for Supersedeas Bond. (Left office at 8:30 and arrived back at 1:00 p.m.)	4
9/12-17/75	Research and review in preparation of Brief to submit to Judge Woodrow W. Jones on appeal of Mr. Butner.	8
9/22-24/75	Preparation of Appeal Brief for U.S. District Court .	12
9/25/75	Appearance before U.S. District Court in Asheville, North Carolina to present oral arguments before the U.S. District Court Judge on appeal of W. E. Butner.	6

10/8-15/75	Miscellaneous conferences and correspondence with Attorneys for first mortgage holders regarding status of case on appeal. Correspondence with Judge Jones.	2
10/17/75	Conference with William E. Butner and Attorney Steve Brackett, at which time Mr. Butner made certain offers to purchase the Bankrupt's property.	1
10/27/75	Travel to Federal District Court in Statesville, North	2

	Carolina, to appeal before Judge Jones.	
10/28/75	Telephone conference with Clerk of Federal District Court in Statesville and telephone conference with Judge Jones regarding rehearing of the case on appeal.	.5
10/31/75	Hearing before U.S. District Court Judge on Appeal of W. E. Butner.	4
11/3-4/75	Preparation of Judgment for Judge Jones and correspondence and conference with Attorneys involved in Appeal to review proposed Judgment.	2
11/5/75	Delivered Judgment to U.S. District Court in Asheville.	3
11/7/75	Preparation of Notice of Re-	2

	sale and submission to newspaper. Telephone calls from Attorneys from Shelby Savings and Loan, the First National Bank of Catawba County, and Fidelity Federal Savings and Loan.	
11/8/75	Letters to previous high bidders to return checks and notify them of Resale.	2
11/11/75	Answering telephone inquiries regarding resale.	3
11/12/75	Held resale of real estate pursuant to Order of the U.S. District Court.	2
11/13/75	Telephone conference with Frank Baker Insurance Co., regarding insurance coverage on real estate. Subsequent let-	3

ter to Frank Baker Insurance Co., regarding insurance premium on Tate Boulevard building. Review of deeds to obtain correct legal description and references for real estate to be conveyed.

11/14/75 Drafting and rechecking legal description to be used in Trustee's Deed to purchaser. Telephone conversations with Attorney for Mr. W. E. Butner and with Attorney for Jack Sipe. Telephone call from Attorney James Gaither, Attorney for the Bankrupt. 3

11/17/75 Drafting proposed Trustee's Deed to William E. Butner and wife, Ann E. Butner. Telephone 6

call from Attorney for William E. Butner. Telephone call from Robert L. McKaughn, Jr.

11/18/75 Telephone call from Attorney for The First National Bank of Catawba County and Fidelity Federal Savings & Loan Association. .5

11/19/75 Office visit from Attorney for William E. Butner regarding signed agreements from Robert L. McKaughn, Jr., and Jack Sipe Construction Co., assigning interests in the Bankrupt's real estate to Mr. Butner. Telephone call to Attorney for Jack Sipe Construction Co., regarding status of said agreement. .5

11/20/75 Delivery of Trustee Deed to William E. Butner together .25

	with check for recording fee on Deed, and received from Mr. Butner executed copies of Assignments from Jack Sipe Construction Co., and Robert L. McKaughn, Jr.	
11-12/75	Telephone conferences and correspondence with Attorneys in California regarding goods stored in Bekins Storage Co.	1.5
12/1/75	Drafted letters to tenants of Golden Enterprises, Inc., notifying them of the new owners of the real estate formerly owned by Golden Enterprises, Inc.	.45
12/1/75	Review Motion for Distribution of Funds filed by William E. Butner.	.25
12/1/75	Letters to insurance company to cancel insurance coverage.	.25

12/4/75	Drafted letters to Duke Power Company, the City of Hickory and Central Telephone Company notifying them of the new owners of the real estate formerly owned by Golden Enterprises, Inc.	1
12/5/75	Drafted Petition and Order for Authorization of Trustee to Store Bankrupt's Records. Filed the same on December 11, 1975.	2
1/76	Review Bekins' Complaint to Recover, wherein Bekins sought to foreclose on its warehouse lien in California. Preparation of Answer and drafting proposed Consent Judgment.	2.5
	TOTAL HOURS	208.9

IV.

That this bankruptcy proceeding has pre-

sented the Trustee with many complicated legal matters. The undersigned has rendered valuable legal services to the Trustee in this proceeding, as hereinabove described.

V.

That the usual and normal charge for professional services rendered by the undersigned is at the rate of $50.00 per hour. The said rate of $50.00 per hour is very reasonable for the legal services rendered in this bankruptcy proceeding. A reasonable Attorney's fee to be paid the undersigned for legal services rendered to the Trustee during the administration of the bankrupt's estate is $10,445.00.

VI.

That the undersigned has incurred certain costs and expenses which have been advanced on behalf of the Trustee during the administration of the bankrupt's estate:

A. Long distance telephone charges: $36.67

To Bankruptcy Office, various creditors and their Attorneys, Clerk of District Court in Asheville and Statesville, and to Judge Jones.

B. Photocopies: 18.00

Copies of Deeds, Deeds of Trust, Leases, Assignments in Register of Deeds Office in connection with title examination and to prepare for Adversary Proceeding; Copies of various leases and other documents to give to various creditors and prospective bidders, including mortgage holders; Copies in connection with Appeal to U.S. District Court.

C. Postage 6.40

D. Travel and mileage:

Travel to Charlotte(adjudication nc

hearing)	
Travel to Statesville (first meeting of crditors)	nc
Travel to Charlotte (review files)	nc
Travel to Charlotte (hearing on adversary proceeding) (110 miles x 15 cents)	$16.50
Travel to Charlotte (confirmation hearing) (110 miles x 15 cents)	16.50
Travel to Charlotte (to file certain pleadings) (110 miles x 15 cents)	16.50
Travel to Rutherfordton (hearing on stay order) (100 miles x 15 cents)	15.00
Travel to Asheville (hearing on Appeal)	24.00

(160 miles x 15 cents)		
Parking	.75	
Travel to Statesville (hearing on Appeal) (60 miles x 15 cents)	9.00	
Travel to Asheville (deliver Order to Court) (160 miles x 15 cents)	24.00	
Parking	.75	$123.00
TOTAL EXPENSES		$184.07

VII.

That the undersigned has filed an Affidavit with the Court to comply with Rule 219 of the Bankruptcy Act.

THEREFORE, the undersigned Attorney hereby petitions the Court for an allowance of compensation for legal services rendered in the above-entitled bankruptcy proceedings in the sum of $10,445.00, plus the sum of $184.07 for expenses advanced as

hereinabove described.

This 19th day of January, 1976.

CAGLE & HOUCK

Attorneys at Law

By /s/ Joe N. Cagle

Joe N. Cagle, Attorney

Fidelity Federal Building

P.O. Box 2050

Hickory, North Carolina

28601

Telephone:(704)322-2207

(Verification omitted in printing)

(Jurat omitted in printing)

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

OBJECTION TO ALLOWANCE OF CLAIMS

TO: U. S. Bankruptcy Judge

P. O. Box 1109

Charlotte, NC 28231

The undersigned Trustee of the above bankrupt objects to the allowance of certain claims filed herein.

The claims objected to and the grounds for the objections are as follows:

A. Claim No. 467 by First Citizens Bank and Trust Company in the amount of $215,887.79, upon the following grounds:

The collateral was released to this creditor pursuant to a Judgment of the U. S. Bankruptcy Court and this creditor no longer has a provable and allowable secured claim. The lien of this creditor was not disturbed or

affected by the bankruptcy proceeding. This creditor was released from the stay of the bankruptcy proceeding and allowed to pursue foreclosure remedies under State law.

B. Claim No. 471 by The First National Bank of Catawba County in the amount of $48,018.98, upon the following grounds:

The collateral was sold subject to this lien and this creditor no longer has a provable and allowable secured claim. The reason is that the lien of this creditor was unaffected by the sale, that it was not transferred to the proceeds, and that none of the funds in the hands of the Trustee were derived from the sale of the collateral involved. The lien of this creditor was not disturbed or affected by the bankruptcy proceeding. Therefore, this claim should be disallowed in toto because the secured creditor was left free to pursue and recover the collateral outside, without any interference of the Bankruptcy Court, and may subject the collateral

to the satisfaction of its claim.

C. Claim No. 469 by Fidelity Federal Savings and Loan Association in the amount of $176,143.35, upon the following grounds:

The collateral was sold subject to this lien and this creditor no longer has a provable and allowable secured claim. The reason is that the lien of this creditor was unaffected by the sale, that it was not transferred to the proceeds, and that none of the funds in the hands of the Trustee were derived from the sale of the collateral involved. The lien of this creditor was not disturbed or affected by the bankruptcy proceeding. Therefore, this claim should be disallowed in toto because the secured creditor was left free to pursue and recover the collateral outside, without any interference of the Bankruptcy Court, and may subject the collateral to the satisfaction of its claim.

D. Claim No. 464 by Shelby Savings and Loan Association in the amount of $980,507.02 upon the following

grounds:

The collateral was sold subject to this lien and this creditor no longer has a provable and allowable secured claim. The reason is that the lien of this creditor was unaffected by the sale, that it was not transferred to the proceeds, and that none of the funds in the hands of the Trustee were derived from the sale of the collateral involved. The lien of this creditor was not disturbed or affected by the bankruptcy proceeding. Therefore, this claim should be disallowed in toto because the secured creditor was left free to pursue and recover the collateral outside, without any interference of the Bankruptcy Court, and may subject the collateral to the satisfaction of its claim.

E. Claim No. 478 by William E. Butner (apparently on behalf of himself, Robert L. McKaughn, Jr., and Jack Sipe Construction Co.) in the amount of $360,000.00, upon the following grounds:

The collateral was sold free and clear of this lien

with the lien transferred from the property to the proceeds of the sale. The U. S. District Court allowed this creditor to bid at the sale with the amount of his debt in lieu of putting up cash. This creditor became the highest bidder at the resale of the collateral. Thus, none of the funds in the hands of the Trustee were derived from the sale of the collateral.

F. Claim No. 425 by William E. Butner and Robert L. McKaughn, Jr., in the amount of $250,000.00, upon the same grounds as stated in Objection E, supra. Further, this is a duplication of the claim referred to in Objection E.

G. Claim No. 482 by William E. Butner in the amount of $250,000.00, upon the same grounds as stated in Objection E, supra. Further, this is a duplication of the claim referred to in Objection E.

H. Claim No. 144 by Jack Sipe Construction Company in the amount of $81,248.46, upon the same grounds as stated in Objection E, supra. Further, this is a dupli-

cation of the claim referred to in Objection E.

I. Claim No. 143 by First Citizens Bank and Trust Company in the amount of $532,219.36, upon the following grounds:

The amount of this claim apparently included a secured claim which was paid in full during the "arrangement" period. It apparently also includes the claim referred to in Objection A, supra. Thus, the actual amount of the claim of this creditor needs to be determined. Further, the information from the bankrupt indicates that no amount is owing to this creditor.

J. Claim No. 192 by First Citizens Bank and Trust Company in the amount of $1,152,000.00 upon the same grounds as stated in Objection I.

K. Claim No. 436 by Marine Midland Leasing Corp. in the amount of $108,521.47, upon the following grounds:

This claim was partially compromised, settled, and paid during the "arrangement" period, leaving this

creditor with an unsecured claim for $67,495.61. In other words, Claim No. 477 by Marine Midland Leasing Corp. in the amount of $67,495.61 is allowed.

L. The Trustee has an apparent claim against William E. Butner, Robert L. McKaughn, Jr., and Jack Sipe Construction Co., for rent payments on Phase II of that certain building located on Tate Boulevard, Hickory, North Carolina, at the rate of $2,262.55 for the months of September - November, 1975. Thus, any claims from these creditors should be offset by said amounts.

WHEREFORE, the undersigned Trustee prays that said claims as above set forth be disallowed, or reduced by offsets as indicated, and for such other and further relief as indicated above.

This the 17th day of February, 1976.

/s/ Joe N. Cagle, Trustee

COUNSEL:

Joe N. Cagle, Attorney

CAGLE AND HOUCK, Attys.

Fidelity Federal Building

P. O. Box 2050

Hickory, NC 28601

Telephone: (704) 322-2207

(Certificate of Service omitted in printing)

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

SUPPLEMENTAL PETITION FOR ATTORNEY'S FEES

The undersigned Attorney hereby files this Supplemental Petition for an allowance of compensation for professional services rendered to and for the Trustee in Bankruptcy for Golden Enterprises, Inc., since January 19, 1976, and respectfully shows unto the Court as follows:

I.

That the undersigned has rendered valuable and beneficial legal services to and for the Trustee since January 19, 1976, as follows:

Date	Services Rendered	Hours
January 20, 1976	Drafting Petition for Attorney's Fees and Affidavit under Rule 219	2.5

February 9, 1976	Examination of proof of claims on file in the U.S. Bankruptcy Office	6
February 10, 1976	Review of Bankrupt's records to verify validity and amounts of certain proof of claims	3.5
February 16, 1976	Preparation and drafting Trustee's Objections to allowance of claims and filing same with the Bankruptcy Office	3.5
February 18, 1976	Drafting Petition for private sale of file cabinets and filing same with the U.S. Bankruptcy Court	1
February 19, 1976	Preparation and drafting Final Report of Trustee	5
	TOTAL HOURS	21.5

II.

That the usual and normal charge for professional

services rendered by the undersigned is at the rate of very reasonable for the legal services rendered in this bankruptcy proceeding.

III.

That the undersigned has incurred certain costs and expenses since January 19, 1976, which have been advanced on behalf of the Trustee during the administration of the bankrupt's estate:

A. Travel and mileage:

Travel to Charlotte (examination of claims)	$16.50

B. Long distance telephone charges:

To Bankruptcy Office	$ 6.50
TOTAL EXPENSES	$23.00

IV.

That the undersigned has filed an Affidavit with the Court to comply with Rule 219 of the Bankruptcy Act.

THEREFORE, the undersigned Attorney hereby peti-

tions the Court for an allowance of compensation for legal services rendered in the above-entitled bankruptcy proceedings in an additional sum of $1,075.00 for a total of $11,520.00, plus additional expenses of $23.00, for total expenses of $207.07.

This the 19th day of February, 1976.

CAGLE AND HOUCK

Attorneys at Law

By: /s/ Joe N. Cagle, Attorney

Fidelity Federal Building

P. O. Box 2050

Hickory, North Carolina 28601

Telephone: (704) 322-2207

(Verification omitted in printing)

(Jurat omitted in printing)

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

TRUSTEE'S FINAL REPORT

TO: U. S. Bankruptcy Judge

The undersigned Trustee in Bankruptcy for the above-named bankrupt files this Final Report as follows:

I.

An itemized, detailed account of the receipts and disbursements since the last interim report is as follows:

RECEIPTS SINCE LAST INTERIM REPORT

December 10, 1975 Frank Baker Ins.--Return of unearned ins. premium $381.00

DISBURSEMENTS SINCE LAST INTERIM REPORT

November 17, 1975 Intangible Tax--Deducted by Bank $ 7.70

December 1, 1975 Frank Baker Ins.--Partial

	fire ins. premium	52.30
December 5, 1975	Shelton Wynne--Labor to store records	15.00
December 5, 1975	Bill Hurst--Labor to store records	15.00
January 6, 1976	Abernethy Transfer & Storage Co.--Storage charges	30.00
January 22, 1976	First Security Company--Trustee bond	200.00
January 31, 1976	Abernethy Transfer & Storage Co.--Storage charges	10.00
	Total Disbursements	$330.00

II.

The total receipts during this bankruptcy proceeding to date have been $163,638.99, including accrued interest on savings. The balance on hand is $158,635.43 in savings and $837.34 on checking, at North Carolina

National Bank, Hickory, North Carolina. Thus, the total balance on hand is $159,472.77.

III.

Golden Enterprises, Inc., filed a Petition in Bankruptcy for an Arrangement under Chapter XI on May 4, 1973. Thereafter, Golden Enterprises, Inc., was adjudged a bankrupt on February 14, 1975. The first meeting of creditors was held on April 16, 1975. Thus, creditors had until October 16, 1975, in which to file claims.

First Citizens Bank and Trust Company filed an Adversary Proceeding in May, 1975, seeking to recover certain real estate from the bankruptcy proceeding in order to foreclose under its Deed of Trust. A Judgment was entered by the U.S. Bankruptcy Judge on June 4, 1975, allowing First Citizens Bank and Trust Company to recover said real estate.

On or about June 11, 1975, the Trustee filed a Complaint in the U. S. Bankruptcy Court seeking to sell

the remaining real estate free of certain liens. On June 30, 1975, a Hearing was held and the U. S. Bankruptcy Judge ordered the sale. The sale was held on July 28, 1975, and a Confirmation Order was entered on August 11, 1975. The Confirmation Order was appealed to the U. S. District Court on August 19, 1975. Thereafter, an Order of the U.S. District Court was entered on November 7, 1975, directing the Trustee to resell the real estate on November 12, 1975. The Trustee's Deed was dated November 19, 1975, and delivered to the purchasers.

In January, 1976, Bekins Moving & Storage Co., of Los Angeles, California, filed an Adversary Proceeding seeking permission to allow it to foreclose on the goods in its warehouse. A Judgment was entered by the U. S. District Court on January 30, 1976, granting Bekins Moving & Storage Co., authority to foreclose on its warehouse lien under the laws of the State of California.

The Trustee stored the Bankrupt's records at Abernethy Storage & Transfer Co., for safekeeping pending the closing of the bankruptcy proceeding. Thus, all tangible assets of the bankrupt estate have been disposed of except the bankrupt's records to be disposed of and four metal file cabinets, and, the Trustee has filed a Petition seeking authority to sell the four cabinets at private sale.

IV.

All the assets as listed on the Statement of Assets filed by the Bankrupt's Attorney have been disposed of or otherwise accounted for (see Paragraph III, supra) except the possible "lawsuits" against National Velvet Plusch, Inc., U. S. Properties, Inc., for breach of leases and National Cash Register for possible breach of warranty. The Trustee has been unable to locate any documents, records or obtain sufficient information on which to substantiate these items. Further, National Velvet Plusch, Inc., and U. S. Properties went out of

business in 1974 and there are no assets to be found.

However, there is an outstanding claim for rent against Travel World for the months of October and November, 1975, totaling $650.00. Also, there is an outstanding claim for lease payments against William E. Butner, Robert L. McKaughn, Jr., and Jack Sipe Construction Co., at the rate $2,262.55 for the months of September-November, 1975, for a total sum of $6,787.65. Therefore, the Trustee recommends that these accounts be sold to the highest bidder at the final meeting of creditors.

V.

I or my attorney have examined the claims on file with the Bankruptcy Judge and believe that the same should be allowed for the amounts therein claimed, or for such other amounts as have been fixed by orders of this Court, or the amounts contained in the Trustee's Objections now pending. The Trustee has objected to Claim Nos. 467, 471, 469, 464, 478, 425, 482, 144, 143,

192 and 436.

VI.

I have examined into the amount paid prior to filing the Petition to any attorney for the bankrupt for services rendered or to be rendered in connection with this bankruptcy proceeding. Insofar as I have been able to determine, no payment was made to any attorney for filing the Petition in Bankruptcy.

VII.

The undersigned requests the sum of $2,303.50 as compensation for his services as Trustee, and the sum of $11,520.00 as compensation for legal services rendered as Attorney for the Trustee. The undersigned has filed separate Petitions wherein the professional services are described in detail. Also, the affidavit required by Rule 219(a) was filed with the Court on January 20, 1976.

VIII.

The disbursements by the Trustee to date have been

charged to the costs of administration. The following is a tentative schedule reflecting the claims of those (except the claims to which the Trustee has objected) who claim a priority:

Name	Amount	Expenses
Joe N. Cagle, Trustee	$ 2,303.50	
Joe N. Cagle, Attorney for Trustee	$11,520.00	$ 207.07
Referee's Salary & Expense Fund (fee)	$ 5,165.17	
Referee's Salary & Expense Fund (special services)	$ 736.00	
Referee's Salary & Expense Fund (during Arrangement phase)	Unknown	
James M. Gaither, Jr., Attorney for Bankrupt	$34,433.75 (Bal. under Ct. Order 6/11/74)	$2,240.13

James M. Gaither, Jr., Attorney for Bankrupt	$18,665.00 (Supplemental Petition)	$2,576.39
Joseph H. Frier, Jr., Arthur I. Winard and J. Carroll Abernethy, Jr., Attorneys for Creditors' Committee	$22,000.00	$1,000.00
Lawing, Rowe & Company, Accountants	$ 4,137.25	
Jack Sipe Construction Co., Contractor during Arrangement phase	$26,451.77	
Tax Collector City of Hickory Hickory, NC 28601	$ 3,271.54	
Internal Revenue Service P. O. Box 20541 Greensboro, NC 27420	$50,388.28	
N. C. Department of Revenue P. O. Box 25000		

Raleigh, NC 27611

Attention: James P. Senter $31,437.41

N. C. Department of Revenue

P. O. Box 25000

Raleigh, NC 27611

Attention: James P. Senter $ 3,537.39

Employment Security Commission

of N. C.

P. O. Box 25903

Raleigh, NC 27611 $ 2,527.33

Employment Security Agency

Georgia Department of Labor

296 State Labor Building

Atlanta, GA 30334 $ 1,518.70

Director of Department of

Employment

State of California

Sacramento, CA 95867 $ 2,278.98

Director of Department of

Employment

State of California

Sacramento, CA 95867 $ 729.89

Tax Collector

Hally County

Gainesville, GA 30501 $ 576.63

State Revenue Commissioner

of Georgia

410 Trinity-Washington Building

Atlanta, GA 30334 $2,045.81

California Franchise Tax Board

Sacramento, CA 95867 $ 400.00

WHEREFORE, the undersigned Trustee requests that this Final Report be approved and confirmed and that the Court schedule a final meeting of creditors for the following purposes:

A. to hear the Trustee's Objections To Claims;

B. to hear any objections to this Final Report;

C. to set allowances for fees and commissions in this Bankruptcy proceeding;

D. to sell any accounts receivable or choses in action to the highest bidder;

E. to hear all other matters now pending;

F. to enter an Order of final distribution;

G. and to discharge the Trustee as by law provided.

This the 20th day of February, 1976.

/s/ Joe N. Cagle, Trustee

COUNSEL:

Joe N. Cagle, Attorney

Cagle and Houck, Attys.

Fidelity Federal Building

P. O. Box 2050

Hickory, NC 28601

Telephone: (704) 322-2207

IN THE DISTRICT COURT FOR THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

AMENDMENT TO TRUSTEE'S FINAL REPORT

TO: U.S. Bankruptcy Judge

The undersigned Trustee files this Amendment to the Final Report as follows:

Paragraph VIII of the Trustee's Final Report is amended to reflect the correct applications for allowances filed by the Attorneys for the Creditors' Committee, as follows:

Name	Amount	Expenses
Joseph H. Frier, Jr., and J. Carroll Abernethy, Jr., Attorneys for Creditors' Committee	$22,000.00	$1,000.00
Arthur I. Winard, Attorney for Creditors' Committee	$16,312.00	$ 46.76

This Amendment to the Trustee's Final Report is dated this the 31st day of March, 1976.

/s/ Joe N. Cagle, Trustee

COUNSEL:

Joe N. Cagle, Attorney

Cagle and Houck, Attys.

Fidelity Federal Building

P. O. Box 2050

Hickory, NC 28601

Telephone: (704) 322-2207

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

BRIEF IN SUPPORT OF APPLICATION FOR FEES

BY THE ATTORNEY FOR THE DEBTOR

THIS BRIEF is offered in support of the application for fees submitted by James M. Gaither, Jr., attorney for the debtor in the above captioned matter.

Bankruptcy Rule 11-31, entitled, "Compensation for Services and Reimbursement of Expenses," reads as follows:

"Bankruptcy Rule 219 applies in Chapter XI cases. Reasonable compensation for services beneficial to the estate and reimbursement of necessary expenses may be allowed to the attorney for the debtor and debtor in possession whether or not a plan is confirmed."

In the above captioned matter this Chapter XI pro-

ceeding was instituted on May 4, 1973. A plan was accepted by the requisite amount in number and amount of creditors, but debtor was unable to obtain a confirmation of the plan. An amended plan of arrangement was approved and ordered. Debtor was unable to obtain confirmation of this plan due to the lack of funds for use as a deposit. This Chapter XI was terminated and adjudicated a straight bankruptcy in February, 1975.

James M. Gaither, Jr., attorney for the debtor, has heretofore filed application for fees pursuant to Bankruptcy Rule 219. The applications are dated and filed on December 18, 1973; May 20, 1974 and August 18, 1975.

Pursuant to the applications filed December 18, 1973 and May 20, 1974, an Order was entered on June 11, 1974 by Judge Cruciani (see attached Exhibit A) ordering payment of the sum of $34,443.75 as attorney fees and $2,240.13 as expenses. The sum of $9000.00 has been paid to Gaither pursuant to that order leaving a

balance due of $25,443.75 plus $2240.13 due for expenses incurred. No consideration has been made of the Application filed August 18, 1975. (See Exhibit B attached.)

Bankruptcy Rule 219 sets forth the manner and scope of an application for fees by the attorney. With respect to an attorney's compensation, it has been said that, "the principal factors which enter into a determination of what is reasonable are the time spent, the intricacy of the questions involved, the size of the estate, the opposition encountered, the results obtained, and the economic spirit of the Bankruptcy Act to curtail unnecessary expenses." In Re Paramount Merrick, Inc., 252 F Second 482, 485, 2nd Circuit, (1958). Although the Western District of North Carolina local bankruptcy rules are not set forth in Colliers on Bankruptcy, the Middle District Rules are. Local Bankruptcy Rule No. 40 for the Middle District of North Carolina states:

"Rule 49(c) Fixing Fees.

In fixing compensation of an attorney the following factors shall be taken into consideration: (1) Amount of work done, (2) Length of time employed, (3) Difficulties or intricacies of the bankruptcy proceedings, (4) Results accomplished, (5) Amount involved in connection with services rendered, (6) Size of the estate, (7) The skill and experience of counsel in similar cases, (8) Contingency or uncertainty of compensation."

I would like to comment on the various factors regarding the fixing or allowing of a fee in this matter.

A. Time Spent: My time is before the Court for the consideration of the Court.

B. The size of the estate: The bankrupt estate consisted of real and personal property worth in excess of 2.5 - 3 million dollars as follows:

Real Estate	3 building lots	$ 30,000
Shopping Center		300,000
Continental Systems Supply		350,000

Metelpel	75,000
Tate Boulevard	1,000,000
5 Acres	50,000
Subtotal	1,805,000
Inventory	700,000
Total	$2,505,000

In addition the estate generated income from sale or lease of real and personal property from May, 1973 to February, 1975 in excess of one million dollars as follows:

Sale of Thomasville fixtures & inventory	$ 175,000
Sale in ordinary course of business of inventory (net)	300,000
Commercial Credit	
Sale of inventory to Silverware Sales	174,000
Rental income for 22 months (5/73-2/75)	450,000
Total	$1,099,000

In addition proceeds from a loan negotiated with Shelby Savings and Loan were received and disbursed

to creditors in the amount of $435,000.

The size of the estate is further illustrated by the number of claims of creditors directly paid, settled or compromised during the period from May, 1973 - February, 1975. For a more detailed explanation, please refer to the Golden Enterprises, Inc. Bankruptcy File. The following is a list of litigated matters, amounts involved and results obtained:

1. Confirmation of Thomasville, North Carolina inventory and fixture sale; May, 1973; $175,000 paid to creditors.
2. Litigation/Matsushita v. Golden Enterprises, Inc., May, 1973-July, 1973; $13,000 paid or compromised.
3. Litigation/Golden Enterprises, Inc. v. William Grooh, May, 1973; $50,000 inventory returned from Georgia to North Carolina.
4. Commercial Credit Business Loan, Inc., May, 1973 - July, 1974. This complex matter re-

sulted in payment to Commercial Credit Business Loans, Inc. of more than $300,000 and involved litigation to return inventory from California and Georgia.

5. Marine Midland Bank/litigation. Resulted in payment and compromise of $108,000 claim.
6. Shelby Savings and Loan transaction was a very complex matter, involving construction of 45,000 square foot building and payments and settlements to creditors, secured and unsecured, in the amount of $545,000 as follows:

a. First Citizens Bank $275,000 prior construction loan

b. Growth Enterprises 70,000 purchase money deed of trust

c. Contractor 70,000 labor & material to complete

d. Supplies 110,000 labor & materials

e. Taxes 18,000

New construction created additional rent from completion to February, 1975, in excess of $50,000. Shelby increased a loan from $550,000 to $755,000 to allow proposal of Plan of Arrangement. Negotiations were extensive and involved hundreds of hours with attorneys, Board of Directors and Shelby officials.

C. Intricacies of the problems involved: This Chapter XI was attempted because of the debtor's valuable real estate and its potential to pay all debts through the collection of long term rents.

During the Chapter XI all lending institutions were paid monthly with rental income. In addition ad valorem taxes in the amount of $18,000 in 1973, and $6,000 in 1974 were paid. Utilities and insurance were paid. At the end of 22 months (February, 1975) all lending institutions were current except as noted in status reports to the Court. (See Exhibit C attached).

Attorney for debtor drafted numerous documents during Chapter XI that involved financing, securing secured creditors, protective priorities and leases. All involved negotiations. A brief summary follows:

1. Negotiate and draft U.S. Properties lease, 24 May, 1973.
2. Negotiate and draft Young lease, 10 May, 1973.
3. Negotiate and draft Superior Continental lease, 1 January, 1974, Phase I.
4. Negotiate and draft Superior Continental lease, 1 August, 1974, Phase II
5. Draft Superior Continental lease, 19 July, 1974
6. Negotiate and draft Butner, McKaughn, Sipe agreement, 29 July, 1974.
7. Draft and negotiate easement, 15 November, 1974.
8. Draft agreements between second mortgage holders.

9. Draft and negotiate agreement between Butner, McKaughn, Sipe and Creditors Committee, 28 February, 1974.

10. Negotiate Amended Plan of Arrangement, November, 1973 - February 14, 1974.

11. Various suits were filed and litigated with respect to sale free of liens.

12. Drafted second deed of trust to Butner, McKaughn, Sipe, including hours of negotiations.

D. Results Obtained. The most important results obtained were acceptance of a Plan of Arrangement and an Amended Plan of Arrangement and the payment to secured and some unsecured creditors of more than $1,000,000. The work done with the real estate, especially from July, 1974 until February, 1975, saved the estate a receiver's fee. With the exception of Mr. Joe Golden, who collected and disbursed rents, the company had no employees from July, 1974, until adjudication, yet much work was done.

In addition James M. Gaither, Jr. acted as Disbursing Agent for $175,000 received for the sale of inventory in the summer of 1974. The balance of this account $1473.76 was turned over to Joe Cagle on April 1, 1975. No compensation has been set or received for this work. Also, the funds were received as a result of negotiations between the purchaser, Thomas Golden, and James M. Gaither, Jr. The sales price was $20,000 higher than any other offer.

Exhibit D attached sets forth the circumstances regarding the Amended Plan of Arrangement. Exhibit E is a former affidavit in support of fees.

RESPECTFULLY SUBMITTED,

/s/ James M. Gaither, Jr.

Attorney for Debtor

P. O. Box 1650

Hickory, NC 28601

Telephone: 704-322-5505

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

RECEIPTS AND DISBURSEMENTS SINCE DATE OF FINAL REPORT

767a

TO: U. S. Bankruptcy Judge

I.

An itemized, detailed account of the receipts and disbursements since the date of the Final Report is as follows:

RECEIPTS

Frank Baker Ins.--Return of insurance premium:	$ 935.70
Interest on savings:	$ 2,624.48
	$ 3,560.18

DISBURSEMENTS

March 1, 1976	Abernethy Transfer & Storage Co.--Storage charges	$ 10.00
April 1, 1976	Abernethy Transfer & Storage Co.--Storage charges	$ 10.00
May 11, 1976	Abernethy Transfer & Storage Co.--Storage charges	$ 10.00
May 13, 1976	Split Second Printing--final notice	$ 21.63
June 4, 1976	Abernethy Transfer & Storage Co.--Storage charges	$ 10.00
	TOTAL	$ 61.63

768a

II.

The total receipts during this Bankruptcy proceeding to date have been $167,399.17, including accrued interest on savings. The total disbursements have been $4,427.85. The balance on hand is $161,259.91 in savings and $1,711.41 on checking, at North

Carolina National Bank, Hickory, North Carolina. Thus, the total balance on hand is $162,971.32.

Dated this the 10th day of June, 1976.

/s/ Joe N. Cagle, Trustee

COUNSEL:

Joe N. Cagle, Attorney

Cagle and Houck, Attys.

Fidelity Federal Building

P. O. Box 2050

Hickory, NC 28601

Telephone: (704) 322-2207

The Order of the United States Bankruptcy Court by the Honorable Marvin R. Wooten, Bankruptcy Judge, dated July 1, 1976, is to be found in the Appendix to the Petition for Certiorari at pages 2a-20a.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA-STATESVILLE DIVISION

BANKRUPTCY NO. ST-B-73-6

(Caption omitted in printing)

NOTICE OF APPEAL TO DISTRICT COURT

WILLIAM E. BUTNER, secured creditor of the above-captioned bankrupt, appeals to the District Court from the Order of the Bankruptcy Judge, the Honorable Marvin R. Wooten, entered in this cause on July 1, 1976, which said Order approved and ratified and confirmed in part the Final Report of the Trustee in the above-entitled action and disbursed funds now held by the Trustee and found the said William E. Butner to be an unsecured rather than a secured creditor of this bankrupt estate, and taxing all expenses coincidental to the administration of this estate prior to and subsequent to being adjudicated bankrupt to the real estate.

The parties to the Order appealed from and the

addresses of their respective attorneys are as follows:

1. James M. Gaither, Jr.

   Attorney for the Bankrupt

   Post Office Box 1650

   Hickory, North Carolina 28601

2. W. George Huffman

   Attorney for Jack Sipe Construction Company

   Post Office Box 2021

   Hickory, North Carolina 28601

3. C. B. Cash, Jr.

   Attorney for Shelby Savings and Loan Association

   Post Office Box 729

   Shelby, North Carolina 28150

4. William R. Sigmon

   Attorney for Fidelity Federal Savings and Loan Association and the First National Bank of Catawba County

   Post Office Box 1792

   Hickory, North Carolina 28601

5. E. Murray Tate, Jr.

Attorney for First-Citizens Bank and Trust Company

Post Office Drawer 2428

Hickory, North Carolina 28601

6. Joe N. Cagle

Trustee for Bankrupt

Post Office Box 2050

Hickory, North Carolina 28601

7. Joseph H. Frier, Jr.

Attorney for Creditors' Committee

Seven Dey Street

New York, New York 10007

8. Arthur I. Winard

Attorney for Creditors' Committee

475 Fifth Avenue

New York, New York 10017

9. J. Carroll Abernethy, Jr.

Attorney for Creditors' Committee

Post Office Box 1492

Hickory, North Carolina 28601

10. William J. Lawing

Certified Public Accountant

Post Office Box 2675

Hickory, North Carolina 28601

11. Charles B. Camp

Employee

Shelby, North Carolina 28150

This the 9th day of July, 1976.

/s/ William E. Butner

BUTNER, RUDISILL & BRACKETT

Attorneys for the Appellant

Post Office Box 2323

Hickory, North Carolina 28601

Telephone: (704) 322-3130

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

BANKRUPTCY NO. ST-B-73-6

JOE N. CAGLE, Trustee in Bankruptcy for Golden Enterprises, Inc., et al., Appellees, vs. WILLIAM E. BUTNER, Appellant.

AFFIDAVIT AND SUPPLEMENTAL REPORT

OF THE COURT

Now comes JOE N. CAGLE, Trustee, and J. CARROL ABERNETHY, JR., Attorney for the Creditors Committee and say:

WHEREAS, U. S. District Court Judge Woodrow Jones has held numerous hearings and heard arguments in this appeal, the latest being in chambers on November 4, 1976, at Asheville, North Carolina; and

WHEREAS, at said hearings, Appellant has made certain representations in his arguments regarding his equities in the matter, to wit, that he had to pay

some $30,000.00 in ad valorem taxes and had received only small amounts from the sale and refinancing of the properties which he purchased from the Bankrupt Estate;

AND WHEREAS, the undersigned have certain information regarding Appellant's acquisition of the property that should be brought out since it bears on the equities in this matter;

NOW, THEREFORE, the undersigned first being duly sworn, show unto the Court on information and belief as follows:

1. That Appellant purchased all of Golden Enterprises' real estate at the Bankruptcy sale subject to outstanding first mortgages and ad valorem taxes.

2. That Appellant paid ad valorem taxes to City of Hickory for the year 1974 in the amount of $3,503.49, which sum represented the balance due for Golden's 1974 taxes. Golden Enterprises and not Appellant paid all of the 1974 Catawba County real property

ad valorem taxes (See Exhibit 1 attached).

3. That Appellant paid $8,077.85 to City of Hickory for 1975 real property ad valorem taxes for Golden Enterprises. (See Exhibit 2 attached).

4. That Appellant paid $6,336.60 to Catawba County for 1975 real property ad valorem taxes of Golden Enterprises. (See Exhibit 3 attached).

5. That Appellant sold a portion of the Tate Boulevard Tract to Carter-Hickory Corporation on April 7, 1976, for a sales price of $1,000,000.00. From the proceeds of this sale, the first mortgage to Shelby Savings and Loan Association in the sum of $820,033.00 was paid off, which sum included payment of an attorney's fee of $10,000.00 for Shelby's attorney. The real estate taxes totaling $17,917.94 (as described in paragraphs 2, 3, and 4, supra) were also apparently paid from the sales proceeds. Thus, the Appellant apparently received net proceeds or profit from this sale in the sum of $162,049.06.

6. That Appellant refinanced the Shopping Center with mortgages to the Wilkes Savings and Loan Association in the total sum of $212,000.00. The first mortgage to Fidelity Federal Savings and Loan Association in the total sum of $191,965.76 was paid off, which sum included payment of an attorney's fee of $975.00 for Fidelity's attorney. Thus, the Appellant apparently received net proceeds or profit from this refinance in the sum of $28,034.24.

7. That Appellant refinanced the Continental Systems Building Tract with a mortgage to Wilkes Savings and Loan Association in the amount of $290,000.00. The first mortgage to Shelby Savings and Loan Association in the total sum of $223,532.50 was paid off, which sum included payment of an attorney's fee of $5,000.00 for Shelby's attorney. Thus, the Appellant apparently received net proceeds or profit from this refinance in the sum of $66,467.50.

8. That Appellant refinanced the Metelpel Building

Tract with a mortgage to Taylorsville Savings and Loan Association in the amount of $85,000.00. The first mortgage to First National Bank of Catawba County in the total sum of $48,520.51 was paid off, leaving Appellant with an apparent net proceeds or profit in the sum of $36,479.49.

9. That Appellant has retained the 5-acre vacant tract of land near Tate Boulevard, which remains unencumbered. This vacant tract was valued at $50,000.00 during the period of the Arrangement and the Appellant apparently still owns said tract free and clear.

10. That Appellant has apparently sold one-half interest in the Continental Systems Building, the Shopping Center, and the Metelpel Building to a Robert Yount, subject to the new mortgages referred to above, but the sales price therefor is unknown.

11. That the Appellant has apparently received net proceeds or profit from the sales and refinancing, supra, in the total sum of $343,030.29. Nevertheless,

the Appellant is still pursuing a claim of $186,000.00, which would net him an even bigger windfall, since he still owns most of the real estate and especially since the real estate is obviously worth more than the amounts of the new mortgages outstanding thereon. Thus, it appears that the Appellant may have made a cash profit of $157,030.29 and he still wants to increase the same.

12. That at the time of the Bankruptcy sale of the Golden real estate to the Appellant, the amount of the $360,000.00 second mortgage was actually reduced to the sum of $272,200.00 as a result of the following: Mr. McKaughn's interest was reduced by the sum of $30,000.00 and Sipe's claim was reduced by the sum of $57,800.00, pursuant to their written agreements with Mr. Butner. Therefore, from an "out of pocket" standpoint, the principal obligation on the second mortgage that Mr. Butner was bidding with was effectively reduced to the sum of $272,200.00. The Appellant obtained the land with a bid of $174,000.00

which was also applied to the outstanding balance on the second mortgage, thereby leaving a balance on that obligation of $98,200.00. And if the Appellant did in fact receive the net proceeds or profit of $343,030.29 from the sales and refinancing as hereinabove described, then his overall profit to date would be at least $244,830.20, and he wants to increase the same at the expense of everyone else in this Bankruptcy Proceeding.

13. That if the Appellant prevails in this Appeal and receives any sizeable portion of the funds in the hands of the Trustee and pays one of his creditors, i.e., The Bank of Granite in the approximate sum of $125,000.00 as the Appellant argued at the last Hearing before this Court (which loan funds were not paid to Golden but were used to repay Appellant's Bank loan at NCNB), then the Appellant will still have made a profit of over a quarter of a million dollars in this matter.

THEREFORE, the undersigned respectfully request the Court to accept this Affidavit as additional informa-

tion in this Bankruptcy Appeal Proceeding.

This 11th day of November, 1976.

/s/ Joe N. Cagle, Trustee

CAGLE AND HOUCK, Attorneys

P. O. Box 2050

Hickory, NC 28601

Telephone: (704) 322-2207

/s/ J. Carroll Abernethy, Jr.

Attorney for Creditors Committee

P. O. Box 1492

Hickory, NC 28601

Telephone: (704) 322-1060

(Jurat omittted in printing)

783a

TAX RECEIPT 19 74 Exhibit 1

Tax Notice No. 7252

CITY OF HICKORY, North Carolina

RECEIVED OF Golden Enterprises, Inc

Valuation ..... X Rate .....

$ 3,092.71

Interest - - - + - - - $ 408.78

Amount Paid - - - + $ 150.00

Received Payment $ 3,503.49

April 9 19 76

Arthur W. Miller
TAX COLLECTOR

This is certification of failure of 1974 taxes on above entry paid

784a

Exhibit 2

CITY OF HICKORY
BOX 398
HICKORY, N.C. 28601

YEAR 1975 NO.

ACCOUNT NO.	VALUE OF REAL ESTATE
	VALUE OF PERSONAL PROPERTY
G.S. 105-277-1	TOTAL VALUE
	TAX DUE $

Golden Enterprises

RATE

PERMANENT RECORD

CITY OF HICKORY
BOX 338
HICKORY, N.C. 28601

YEAR 1975 NO. 03938

ACCOUNT NO.	VALUE OF REAL ESTATE
	VALUE OF PERSONAL PROPERTY
G.S. 105-277-1	TOTAL VALUE 1,272,800
TAX DUE	$ 7,591.36
INTEREST	$ -142.52
AMOUNT PAID	$ 7748.54

int + 329.31

8077.85

AL PAYMENTS

AL	INTEREST

ITION
FUND
UCE
FUND
PROVEMENTS
ATE
CEMBER. INTEREST
PLUS ½% 1ST DAY
AFTER UNTIL PAID.
OUR RECORDS.
OUR RECEIPT.
I ONLY ON REQUEST.

MAIL RIGHT HAND STUB WITH PAYMENT TO →

Arthur W. Miller
Paid April 9, 1976

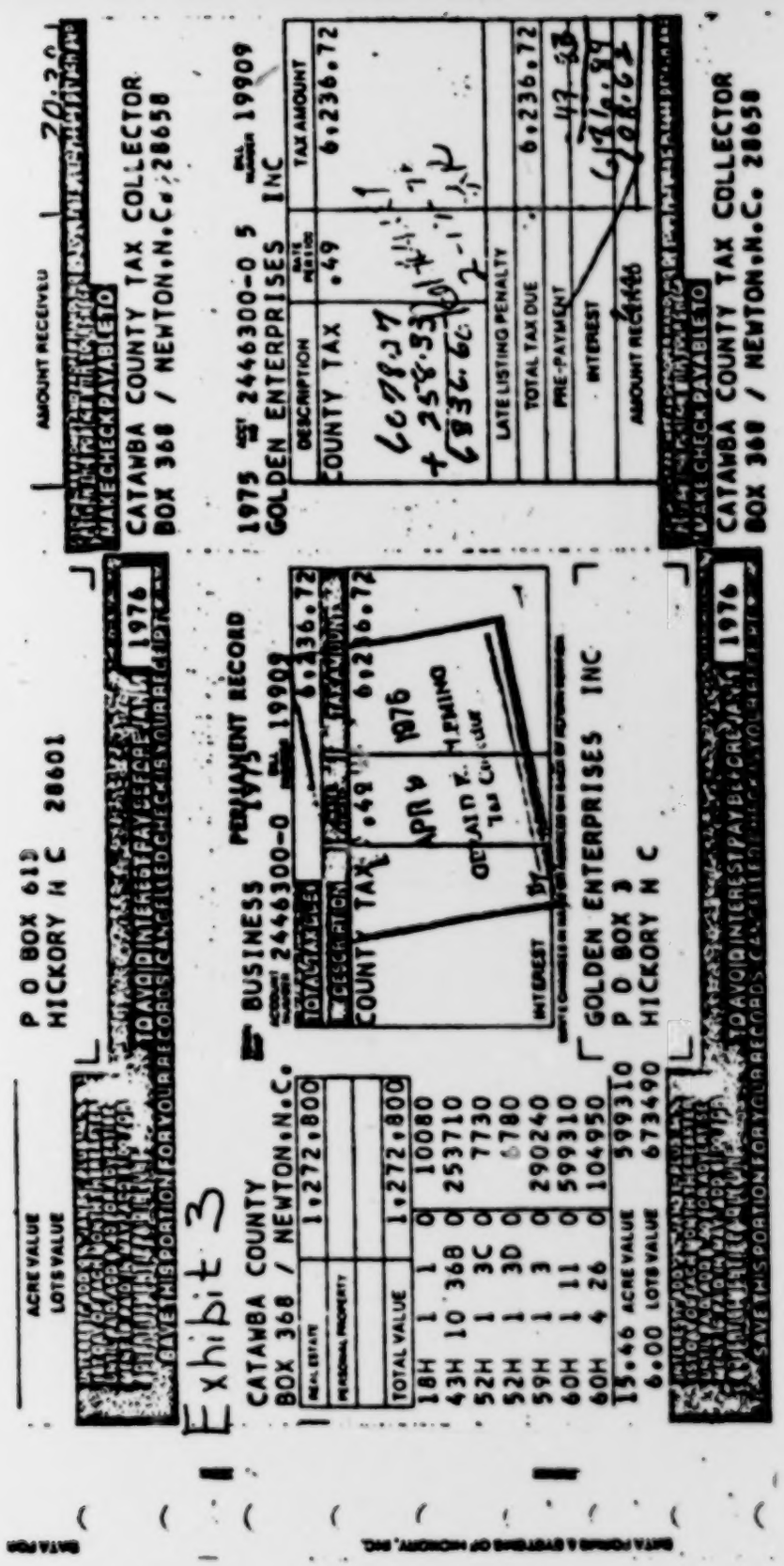

Exhibit 4 (text of document omitted in printing by permission of James M. Gaither, Jr., Attorney for Debtor)

Warranty Deed from William E. Butner and wife, Ann E. Butner to Carter-Hickory Corporation dated April 7, 1976, for the Tate Boulevard property; revenue stamps: $1,000.00; acknowledged April 8, 1976; filed April 9, 1976 at 2:35 p.m. in Catawba County Registry in Book 1094, Page 308.

Exhibit 5 (text of document omitted in printing by permission of James M. Gaither, Jr., Attorney for Debtor)

Deed of Trust from William E. Butner and wife, Ann E. Butner, to Clyde Hayes, Trustee for Wilkes Savings & Loan Association, dated May 28, 1976, in the principal sum of $290,000.00, covering a 3.1 acre tract bounded by Martel Co. and Little Street; acknowledged May 28, 1976; filed May 31, 1976 at 4:20 p.m. in Catawba County Registry in Book 1099, Page 22.

Exhibit 6 (text of document omitted in printing by permission of James M. Gaither, Jr., Attorney for Debtor)

Deed of Trust from William E. Butner and wife, Ann E. Butner, to Rom L. Teague, Sr., Trustee for Taylorsville Savings & Loan Association in the principal sum of $85,000.00, covering Lots 12 through 17, Block B, St. Stephens Lutheran Church property; acknowledged December 15, 1975; filed December 15, 1975 at 12:40 p.m. in Catawba County Registry in Book 1084, Page 715.

Exhibit 7 (text of document omitted in printing by permission of James M. Gaither, Jr., Attorney for Debtor)

Deed of Trust from William E. Butner and wife, Ann E. Butner, to Clyde Hayes, Trustee for Wilkes Savings & Loan Association dated March 1, 1976, in the principal sum of $206,000.00, covering the shopping center property; acknowledged March 15, 1976; filed March 15,

1976 at 2:30 p.m. in Catawba County Registry in Book 1091, Page 964.

Exhibit 8 (text of document omitted in printing by permission of James M. Gaither, Jr., Attorney for Debtor)

Deed of Trust from William E. Butner and wife, Ann E. Butner, to Clyde Hayes, Trustee for Wilkes Savings & Loan Association, dated April 30, 1976, in the principal sum of $6,000.00, covering the shopping center property; filed April 30, 1976 at 4:55 p.m. in Catawba County Registry in Book 1096, Page 33.

Exhibit 9 (text of document omitted in printing by permission of James M. Gaither, Jr., Attorney for Debtor)

Warranty Deed from William E. Butner and wife, Ann E. Butner, to Robert L. Yount, dated April 12, 1976; $1.00 revenue; conveying: Tract I - 3.1 acre tract bounded by Martel Co. and Little Street subject to a deed of trust in favor of Shelby Savings and Loan As-

sociation as recorded in Book 967, Page 28, Catawba County Registry; Tract II - shopping center property subject to a deed of trust in favor of Wilkes Savings & Loan Association as recorded in Book 1091, Page 964, Catawba County Registry; Tract III - Lots 12 through 17, Block B, St. Stephens Lutheran Church property, subject to a deed of trust in favor of Taylorsville Savings & Loan Association as recorded in Book 1084, Page 715, Catawba County Registry; acknowledged April 12, 1976; filed July 15, 1976 at 11:30 a.m. in Catawba County Registry in Book 1103, Page 303.

(Certificate of Service omitted in printing.)

The Memorandum and Order of the United States District Court for the Western District of North Carolina, Statesville Division, by the Honorable Woodrow W. Jones, Chief Judge, dated November 12, 1976, is to be found in the Appendix to the Petition for Certiorari at pages 21a-30a.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

NOTICE OF APPEAL

Notice is hereby given that the Trustee in Bankruptcy for Golden Enterprises, Inc., the Attorneys for the Creditors' Committee, the Attorney for the Bankrupt, the Bankrupt, William J. Lawing, C.P.A., and Charles B. Camp, hereby appeal to the U. S. Court of Appeals for the Fourth Circuit from the Order of the Honorable Woodrow W. Jones, Chief Judge of the U. S. Court for the Western District of North Carolina, dated November 12, 1976, and filed in the Office of the Clerk on November 16, 1976.

This 15th day of December, 1976.

CAGLE AND HOUCK

Attorneys for Joe N. Cagle,

Trustee in Bankruptcy

By /s/ Joe N. Cagle, Attorney

Fidelity Federal Building

P. O. Box 2050

Hickory, NC 28601

Telephone: (704) 322-2207

JOSEPH H. FRIER, JR., ARTHUR I. WINARD and J. CARROLL ABERNETHY, JR.,

Attorneys for the Creditors' Committee

By /s/ J. Carroll Abernethy, Jr.,

Attorney

P. O. Box 1492

Hickory, NC 28601

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GAITHER AND GORHAM

Attorneys for Bankrupt

By /s/ James M. Gaither, Jr.,

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North Carolina National Bank Building

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GAITHER AND GORHAM

Attorneys for James M. Gaither, Jr.

By /s/ James M. Gaither, Jr.,

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North Carolina National Bank Building

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GAITHER AND GORHAM

Attorneys for William J. Lawing, C.P.A.

By /s/ James M. Gaither, Jr.,

Attorney

North Carolina National Bank Building

P. O. Box 1650

Hickory, NC 28601

Telephone: (704) 322-5505

/s/ Charles B. Camp

P. O. Box 249

Shelby, NC 28150

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA-STATESVILLE DIVISION

(Caption omitted in printing)

NOW COMES the United States of America, by and through Keith S. Snyder, United States Attorney for the Western District of North Carolina, and hereby appeals from the judgment of the Court filed in this action November 16, 1976.

Keith S. Snyder

United States Attorney

/s/ Jimmie C. Proctor

Assistant United States Attorney

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

(Caption omitted in printing)

AFFIDAVIT OF TRUSTEE

Joe N. Cagle, being first duly sworn, deposes and says:

I.

That Golden Enterprises, Inc., was adjudged a bankrupt on February 14, 1975, and Joe N. Cagle is the duly appointed and acting Trustee in Bankruptcy for said Bankrupt and this Affidavit is made upon personal knowledge of the facts herein contained.

II.

That the Trustee did receive certain rents from the real property during the month of February, 1975, and the Trustee proceeded to write checks to the first mortgage holders and to pay utility bills for the month of February, 1975. (All payments to the second mort-

gage holders had previously been stopped during the Arrangement Period. On information and belief, the payments to the second mortgage holders ceased some time during the latter part of 1974).

III.

That on the same date that the Trustee wrote the checks to the first mortgage holders and utility companies, a Monthly Financial Report for the month of February, 1975, was prepared and mailed to the U.S. Bankruptcy Office by the Trustee. A copy of said Financial Report is annexed hereto as Exhibit "A".

IV.

That upon receipt of the Monthly Financial Report for February, 1975, (Exhibit "A"), Mrs. Joan Harris, one of the Clerks of the U. S. Bankruptcy Office, telephoned the Trustee and informed him that the Trustee was not supposed to make any mortgage payments. When the Trustee questioned this instruction, Mrs. Harris checked with the Clerk, Mrs. Saunders, and

she also informed the Trustee not to make any mortgage payments. Upon further questioning by me, either Mrs. Harris and/or Mrs. Saunders checked with the U. S. Bankruptcy Judge and informed me in a subsequent telephone call that the U. S. Bankruptcy Judge informed them to direct the Trustee not to make any mortgage payments.

V.

That after receiving the telephone call from the U.S. Bankruptcy Office, the undersigned Trustee immediately went to the Bank and stopped payment on the checks which he had previously written to the first mortgage holders. Thereupon, the Trustee prepared an Amended Monthly Financial Report for February, 1975, and filed the same with the U. S. Bankruptcy Judge. A copy of said Amended Monthly Financial Report is annexed hereto as Exhibit "B."

VI.

That the reason given to the Trustee for the instruc-

tions not to make any mortgage payments was that such payments could be considered preferential payments, and, further, the rental income would be needed to pay the costs of administration.

VII.

That the Trustee personally informed the mortgage holders, including first and second mortgage holders, that he would not be making any mortgage payments, pursuant to the instructions of the U. S. Bankruptcy Judge. Thereafter, the Trustee wrote letters to all mortgage holders, informing them of the first meeting of creditors and enclosing a copy of the Notice and Automatic Stay of Proceedings against the Bankrupt.

VIII.

That all the mortgage holders were represented by legal Counsel in this Bankruptcy Proceeding and one has to presume that their Counsel was aware of the fact that a mortgage holder desiring to foreclose had to file an Adversary Proceeding and obtain Court ap-

proval and a release from the "Automatic Stay" of the Bankruptcy law. Only First Citizens Bank and Trust Company filed such an Adversary Proceeding. At no time did Mr. Butner file an Adversary Proceeding to legally request that the Bankruptcy Court allow him to foreclose his second mortgage.

/s/ Joe N. Cagle, Trustee

CAGLE AND HOUCK, Attys.

Fidelity Federal Building

P. O. Box 2050

Hickory, North Carolina 28601

Telephone: (704) 322-2207

(Jurat omitted in printing)

(Certificate of Service omitted in printing)

Exhibit A, Monthly Financial Report for February, 1975, and Exhibit B, Amended Monthly Financial Report for February, 1975, are reprinted in their entirety in Volume I of the Appendix on pages 346a to 352a, supra.

The opinion of the United States Court of Appeals for the Fourth Circuit, decided December 8, 1977, is to be found in the Appendix to the Petition for Certiorari at pages 31a-42a.

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, D.C. 20543

June 12, 1978

William E. Butner, Esq.

P.O. Box 2323

Hickory, North Carolina 28601

RE: William E. Butner v. United States

et al., No. 77-1410

Dear Mr. Butner:

The Court today took the following action in the above case:

"The petition for a writ of certiorari is granted."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a), is due and payable.

Very truly yours,

MICHAEL RODAK, JR.,
Clerk

By /s/ June M. Hoffmann

(Miss) June M. Hoffmann

Assistant Clerk

Enclosures

AIR MAIL

Supreme Court, U. S.
FILED
JUN 1 1978
MICHAEL RODAK, JR., CLERK

No. 77-1410

In the Supreme Court of the United States

OCTOBER TERM, 1977

IN THE MATTER OF GOLDEN ENTERPRISES, INC., BANKRUPT, WILLIAM E. BUTNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

M. CARR FERGUSON,
Assistant Attorney General,

CROMBIE J. D. GARRETT,
CARLETON D. POWELL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1410

IN THE MATTER OF GOLDEN ENTERPRISES, INC., BANKRUPT, WILLIAM E. BUTNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the bankruptcy court (Pet. App. 2a-20a) and the district court (Pet. App. 21a-30a) are unreported. The opinion of the court of appeals (Pet. App. 31a-42a) is reported at 566 F. 2d 1207.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1977 (Pet. App. 31a) and a petition for rehearing was denied on January 6, 1978 (Pet. App. 43a). The petition for a writ of certiorari was filed on April 4, 1978. The jurisdiction of this Court is invoked under 11 U.S.C. 47(c) and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the mortgagee of real property is entitled to rents accruing during the period from the initiation of liquidation proceedings to the foreclosure sale of such property, where the mortgage does not provide for an assignment of the rents, the mortgagee does not seek to have the rents sequestered for his benefit, and the mortgagee has no equitable basis for his claim.

STATEMENT

On May 4, 1973, Golden Enterprises, Inc. (Golden) filed a petition in bankruptcy for an arrangement under Chapter XI of the Bankruptcy Act, as added, Sections 301-399, 52 Stat. 905, and amended (11 U.S.C. 701-799). Golden owned several parcels of income-producing real estate located in North Carolina. These parcels were subject to several first mortgages held by various financial institutions and a second mortgage held by petitioner William E. Butner and others in the amount of $360,000. The second mortgage did not provide for any security interest in, or an assignment of, the rents in event of default. During the arrangement proceedings, an agent was appointed to collect the rents and to apply them to the payment of taxes, insurance and amounts due on the mortgages (Pet. App. 2a, 11a-12a, R. 394-395).[1]

Golden operated as a debtor-in-possession but the plan for an arrangement was never confirmed. On February 14, 1975, the arrangement was converted into a liquidating bankruptcy and a trustee was appointed. Petitioner thereafter acquired all of the interests in the second mortgage. During the ensuing liquidating bankruptcy, the trustee collected the rents but by

[1]"R." refers to the separately bound appendix filed with the court of appeals.

instruction of the bankruptcy court made no payments to petitioner. Petitioner took no steps to appeal these instructions or otherwise move to have the rents sequestered for his benefit, although the mortgage was in default. At the initial meeting of creditors, petitioner requested that the property be abandoned to him, subject to the first mortgages. While not directly opposing the abandonment, the trustee suggested a foreclosure sale of the property. The district court accepted the trustee's suggestion and the real estate, subject to the first mortgages, was sold. Petitioner bid in the property for $174,000 and paid for it by applying part of the debt due him, leaving a balance of $186,000 due on his mortgage note.[2] The deed from the trustee specifically provided that "[t]he accrued rents * * * from [the subject property] are hereby expressly not conveyed, but are reserved to the [trustee]" (Pet. App. 33a). Petitioner accepted the deed (Pet. App. 32a-33a). In an uncontradicted affidavit, the trustee alleged that, while the face amount of petitioner's mortgage was $360,000, his investment was $272,200 and that the value of the property he received in the sale was substantially greater than the $174,000 bid price (R. 365-367).

From the inception of the liquidation proceedings until the foreclosure sale, the trustee collected the rents from the property. After the payment of certain uncontested expenses, the trustee had a fund of $162,971 (Pet. App. 32a). At the final meeting of creditors, petitioner claimed the fund remaining in the hands of the trustee on the basis of the $360,000 second mortgage note. The bankruptcy judge noted that petitioner had been allowed

[2]There were actually two sales of the property. At the first sale, petitioner was not allowed to bid the property in on his mortgage debt. On petitioner's appeal, the district court vacated the confirmation of the sale and ordered the property resold (Pet. App. 22a, 33a).

to bid in the property for $174,000 and that "none of the funds in the hands of the Trustee were derived from the sale of the collateral." He therefore held that "the balance of this claim is disallowed as a secured claim" (Pet. App. 16a-17a). However, the bankruptcy judge accorded unsecured claim status to the $186,000 difference between the mortgage note ($360,000) and the bid price (Pet. App. 17a). The bankruptcy judge also allowed certain uncontested fees and expenses of administration to be paid out of the fund. The balance of the fund was determined to be available for distribution for debts and expenses under Section 64 of the Bankruptcy Act (11 U.S.C. 104)[3] (Pet. App. 17a-19a).

The district court reversed the order of the bankruptcy judge and found that petitioner's "secured status extended to the rents and profits derived from the property during the administration of the bankrupt's estate" (Pet. App. 29a). The court of appeals reversed and remanded the case for reinstatement of the bankruptcy judge's order. In its view, petitioner was not entitled to the rents that accrued during the bankruptcy proceeding because he did not request the bankruptcy court to sequester the rents for his benefit or to appoint a receiver on his behalf (Pet. App. 36a-37a).

ARGUMENT

1. The court of appeals correctly concluded that petitioner, a second mortgagee of real property, was not entitled to the rents arising from the property during the period from the initiation of liquidation proceedings to the foreclosure sale of the property.

---

[3]The government filed its proof of claim as a creditor for unpaid federal taxes of approximately $50,000 (Pet. App. 34a).

As the court properly observed (Pet. App. 34a-35a), the question of a secured creditor's right to income, generated by the secured property during bankruptcy, has produced a conflict in the circuits. However, as the discussion that follows demonstrates, this case is an inappropriate vehicle for the resolution of the conflict because petitioner cannot prevail under either line of authority.

a. In accord with the decision below, the Second, Eighth and Ninth Circuits have held that the mortgagee has no right to the rents once the bankruptcy court assumes control of the property, unless he petitions the bankruptcy judge for a sequestration order, obtains the appointment of a receiver to collect the rents, or secures the bankruptcy judge's consent to foreclose. See *In re Brose*, 254 Fed. 664 (C.A. 2); *Tower Grove Bank & Trust Co.* v. *Weinstein*, 119 F. 2d 120 (C.A. 8); *In re Hotel St. James Co.*, 65 F. 2d 82 (C.A. 9). See also *Fidelity Bankers Life Insurance* v. *Williams*, 506 F. 2d 1242, 1243 (C.A. 4). This approach generally follows state law in determining the entitlement of a mortgagee to rents. For example, where, as here, the law of the state in which the property is located (North Carolina) provides that the mortgagee is not entitled to the rents until he either takes possession of the property or has a receiver appointed to collect the rents for his benefit.[4] These circuits require that the mortgagee take affirmative action to cause the rents to be sequestered for his benefit. See 4A *Collier on Bankruptcy* §70.16 (14th ed. 1976). Under the view of the Second, Eighth, and Ninth Circuits, and the court below, the primary focus is on the nature of the mortgagee's interest in rents under state law, the terms of the mortgage and the acts of the parties. See 4A *Collier, supra*. See also *Freedman's Savings Co.* v. *Shepherd*, 127 U.S. 494, 502.

---

[4]See *Gregg* v. *Williamson*, 246 N.C. 356, 98 S.E. 2d 481; *Kistler* v. *Development Co.*, 205 N.C. 755, 172 S.E. 2d 413.

b. The contrary line of authority is in the Third and Seventh Circuits. See *In re Pittsburgh-Duquesne Development Co.*, 482 F. 2d 243 (C.A. 3); *In re Wakey*, 50 F. 2d 869 (C.A. 7). Those courts have held that the mortgagee may recover the rents if he can establish an equitable basis for his claim. The rationale for these decisions is that the rights of the creditors are fixed at the adjudication of bankruptcy and the bankruptcy divests the mortgagor's possession of the realty. Therefore, the rents arising thereafter belong to the mortgagee and should not be diverted to general creditors. See 4A *Collier, supra*, at §70.16. Under these decisions, however, the mortgagee cannot recover the rents arising during bankruptcy unless he establishes that "the mortgaged property was worth less than the mortgage indebtedness." *In re Cigar Stores Realty Holdings*, 69 F. 2d 823, 824 (C.A. 2). In those circumstances, the Third and Seventh Circuits regard the rents as belonging to the mortgagee as a matter of equity as part of the agreed security "to vindicate its own right of property." *In re Pittsburgh-Duquesne Development Co., supra*, 482 F. 2d at 246.

2. Petitioner argues (Pet. 11-15) that this Court should resolve the conflict of decisions as to the extent of a mortgagee's rights to rents arising during the bankruptcy of the owner of real property. But petitioner would not be entitled to the rents under either the decisions followed by the court below or the rule of the Third and Seventh Circuits.

a. Under the former line of authority, the mortgagee is entitled to the rents only if he seeks to have them sequestered for his benefit so as to establish possession under state law.[5] Petitioner concedes (see Pet. 17-18)

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[5]Petitioner suggests (Pet. 11-13) that reference to state law in determining his claim to the rents as a secured creditor violates Article I, Section 8 of the Constitution, which provides that "[t]he Congress shall have Power * * * To establish * * * uniform Laws on the subject of Bankruptcies throughout the United States." In his view, the decision below violates this uniformity requirement because "the anomalies contained in the property law of the individual states should not be allowed to create differences in application of the bankruptcy laws" (Pet. 12). But it has long been recognized that reference to state law under the bankruptcy laws is not only appropriate, but required. See *Stellwagen* v. *Clum*, 245 U.S. 605, 613; *Thompson* v. *Magnolia Co.*, 309 U.S. 478, 483-484.

that his interest in the rents did not have a secured status under state law. He nevertheless contends (Pet. 16-21) that he took the necessary action in the bankruptcy court to ensure that the rents would be sequestered for his benefit. But the court of appeals correctly concluded that petitioner did not take necessary action to ensure that the rents be sequestered for his benefit (Pet. App. 37a). While a receiver was appointed to collect the rents during the Chapter XI proceeding, petitioner himself recognizes (Pet. 8) that they were not held specifically for his benefit as additional security for his debt. Indeed, after the arrangement was converted into a liquidating bankruptcy, the bankruptcy judge specifically ordered the trustee not to pay any rents to the mortgagees (Pet. App. 32a). Petitioner did not appeal or even protest this order.

Nor do petitioner's actions taken during the liquidating bankruptcy provide any basis for concluding that the rents were collected for his benefit. As the court of appeals stated (Pet. App. 37a):

> He [petitioner] had * * * made several informal requests that the property be abandoned, but when they were not granted he pursued the matter no further. Indeed, he made such a request of the bankruptcy judge at a time after the adjudication,

> when approximately $50,000 in rents had been collected by the trustee; but at that time he stated [that] he would waive any claim to the accrued rents. When the trustee formally requested authority to sell the property, * * * [Petitioner] was made an adversary party to the request. He filed no answer, although he could have requested abandonment, permission for him to foreclose under state law, or a determination of the priority of his lien on the rents.

Moreover, after the sale, petitioner accepted the trustee's deed which specifically reserved the rents to the trustee (Pet. App. 33a). As we have pointed out (*supra*, p. 3), petitioner did not assert a security interest in the rents until the final meeting of creditors. Thus, petitioner cannot be deemed to have taken any timely action to ensure that the rents would be held for his benefit[6] under the line of authorities followed by the decision below.

b. Nor can petitioner prevail under the rule of the Third and Seventh Circuits. As we have noted (p. 6, *supra*), those courts employ equitable considerations in determining a mortgagee's entitlement to rents accruing during bankruptcy. Here, however, there are no special equities in favor of petitioner's claim. While the district court stated (Pet. App. 28a) that it found "no difficulty in determining that equity requires that rents collected"

---

[6]Petitioner argues (Pet. 19) that the decision of the court of appeals was based on the fact that his acts "were not performed 'during bankruptcy' " and that the court did not consider the events which took place in the Chapter XI proceedings (see Pet. 23-24). But it is clear that the court considered all of petitioner's actions both before and after the proceedings were converted into a liquidating bankruptcy. Of primary importance, however, was the fact that the bankruptcy court rescinded its Chapter XI order, and specifically ordered the trustee not to pay the rents of the mortgagee (Pet. App. 36a). Petitioner made no objection to this order.

belonged to petitioner, the court of appeals properly observed that (Pet. App. 37a) "the district court failed to articulate the equitable considerations that it thought required the result that it reached." Indeed, petitioner made no showing that the rents were necessary to make him whole. While petitioner bid in the property for less than the amount of his $360,000 mortgage note, the record also indicates that the property was worth substantially more than the bid-in price indicated and that petitioner "profited from [the] ultimate disposition of the property" (Pet. App. 37a).[7] Compare *In re Cigar Stores Realty Holdings, supra*. In these circumstances, the court of appeals correctly concluded (Pet. App. 38a) that even "[i]f equity has a part in the resolution of a question of this type * * * equity does not supply the answer here."

In sum, petitioner is not entitled to the rents accruing during bankruptcy under either the sequestration rule adopted by the decision below or the equity rule

---

[7]Petitioner asserts (Pet. 21-23) that he suffered an economic loss of $57,774.55. This analysis is based on the fact that while he sold a portion of the property for a profit of $165,000, he was deprived of interest on his note for ten months.

But petitioner ignores the fact that he received property at least equal to his investment in the note. The record establishes that the deed from the trustee was recorded on November 20, 1975 (R. 310). In an affidavit, filed with the district court, the trustee stated that shortly after the foreclosure sale, petitioner sold portions of the real estate and refinanced other portions. Assuming conservatively that the value of the refinanced real estate was only equal to the refinanced debt, petitioner received approximately $293,000 in cash and retained unencumbered property appraised at $50,000, for a total of $343,000. Moreover, the trustee pointed out that petitioner's investment in the note was $272,200 rather than the face value of $360,000 (R. 365-367). These facts were never contested.

employed by the Third and Seventh Circuits. Accordingly, the facts of this case are not appropriate for the resolution of the conflict between these two lines of decisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

M. CARR FERGUSON,
Assistant Attorney General.

CROMBIE J. D. GARRETT,
CARLETON D. POWELL,
Attorneys.

MAY 1978.

DOJ-1978-05

Supreme Court, U. S.
FILED
MAY 19 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
APRIL TERM, 1978

No. 77 - 1410

IN THE MATTER OF:
Golden Enterprises, Inc., Bankrupt.

Joe Cagle, Trustee in Bankruptcy for Golden Enterprises, Inc.; Attorneys for the Creditors' Committee; James M. Gaither, Jr., Attorney for Bankrupt; Golden Enterprises, Inc., Bankrupt; William J. Lawing, C.P.A., and Charles B. Camp,
Respondents,

v.

William E. Butner,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
APRIL TERM, 1978

No. 77 - 1410

IN THE MATTER OF:
Golden Enterprises, Inc., Bankrupt.

Joe Cagle, Trustee in Bankruptcy for Golden Enterprises, Inc.; Attorneys for the Creditors' Committee; James M. Gaither, Jr., Attorney for Bankrupt; Golden Enterprises, Inc., Bankrupt; William J. Lawing, C.P.A., and Charles B. Camp,
Respondents,

v.

William E. Butner,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The order of the Bankruptcy Court (Appendix pp. 2a-20a) is unreported. The opinion of the District Court for the Western District of North Carolina, Statesville Division, reversing and vacating the decision of the Bankruptcy Court (Appendix pp. 21a-30a) is unreported. The opinion of the Court of Appeals, which was delivered on December 8, 1977, is reported as 566 F. 2d 1207, and a copy thereof is appended to Petitioner's Appendix at pp. 31a-43a.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

1. Did the Bankruptcy Judge and the Fourth Circuit correctly apply North Carolina law and Bankruptcy law to the facts of this case?

2. Should the Supreme Court grant certiorari to resolve a split among the Circuits on the issue of competing claims against rental income collected after adjudication of bankruptcy.

STATUTES AND RULES INVOLVED

Rules of Bankruptcy Procedure, Rule 701, 28 U.S.C. 2075

The rules of this Part VII govern any proceeding instituted by a party before a bankruptcy judge to (1) recover money or property, other than a proceeding under Rule 220 or Rule 604, (2) determine the validity, priority, or extent of a lien or other interest in property, (3) sell property free of a lien or other interest for which the holder can be compelled to take a money satisfaction, (4) object to or revoke a discharge, (5) obtain an injunction, (6) obtain relief from a stay as provided in Rule 401 or 601, or (7) determine the dischargeability of a debt. Such a proceeding shall be known as an adversary proceeding.

STATEMENT OF THE CASE

In lieu of the Petitioner's statement of facts, Respondents contend that the facts as reported in the opinion of the Fourth Circuit are substantially correct (Pet. App. 31a-34a).

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. The Bankruptcy Court and the Fourth Circuit correctly applied North Carolina law and appropriate provisions of the Bankruptcy Act to the facts of this case.

In denying Petitioner's claim the Bankruptcy Judge and the Fourth Circuit correctly ruled that in North Carolina, absent a special provision in the security instrument or an assignment of the rents, a mortgagee must take possession of the mortgaged property in order to claim rental income derived therefrom.[1]

Prior to the adjudication of bankruptcy on February 14, 1975, Petitioner had not taken possession or attempted to take possession of the property by foreclosure or otherwise. He does not claim his lien by reason of an assignment or rents or language in the security instrument. In fact, Petitioner did not want possession during the Chapter XI proceeding because of the severe recession in the Country at that time.[2]

It is true that an agent had been appointed during the Chapter XI proceeding to collect rents and make certain payments therefrom toward the payment of Federal and State taxes, ad valorem taxes, first mortgage payments, and secondary mortgage payments (R. p. 86). But an examination of the order and motion (R. p. 85-87) shows that the rents were not sequestered specifically for Petitioner's benefit such as would have effect after adjudication. Indeed, the Trustee was ordered not to make payments on mortgages after he qualified and the agents duties were terminated (Pet. App. 32a).

Following the rationale of the Eighth and Ninth Circuits, it was incumbent upon Petitioner to take steps to sequester the rents following adjudication (4A Collier on Bankruptcy (14th ed.) pp. 161-163). Had he not had ample opportunity to do so, perhaps equity would intervene to protect him. In this case, however, he was made a party to an adversary proceeding pursuant to Rule 701, et. seq., filed by the Trustee

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1 Gregg v. Williamson, 246 NC 356, 98 SE2d 491 (1957); Kistler v. Development Co., 205 NC 755, 197 SE 413 (1934); Killibrew v. Hines, 104 NC 182 (1889).

2 See Bankruptcy Judges Findings of Fact (Pet. App. 4a-6a).

seeking permission to sell the real estate. He filed no answer (Pet. App. 37a) as other mortgagees did while it was incumbent upon him to do so (Bankruptcy Rule 701).[3] Neither did he ask for a receiver on or sequestration order (Pet. App. 36a-37a).

Finally, the Petitioner purchased the real estate, and his lien was transferred to the proceeds of the sale. The deed from the Trustee which specifically reserved the rents to the bankrupt estate, was accepted by Petitioner and recorded (Pet. App. 33a; R. p. 310).

Thus Petitioner did nothing following adjudication to claim a lien upon rental income although he had ample opportunity to do so. In face of the requirements of Bankruptcy Rule 701 and the opportunity afforded him as a defendant in the adversary proceeding, the rulings of the Bankruptcy Judge and the Court of Appeals were correct (Fidelity Bankers v. Williams, 506 F2d 1242, (Fourth Circuit, 1974)).

II. The Supreme Court should not grant certiorari to resolve a split among the Circuits based on the facts of this case.

Petitioner correctly states that a split exists among the Circuits on the issue of the lien of a mortgagee to rents derived from mortgaged property during bankruptcy. Petitioner has not perceived, however, that the conflict, to the extent that it exists, involves situations where the mortgagee has suffered a loss by being denied possession of the property (4A Collier on Bankruptcy (14th ed.) pp. 167-169). Indeed, even in the Third and Seventh Circuits

---

3 Interestingly Petitioner ultimately appealed the confirmation order of the bankruptcy judge on the sale of the real estate free of liens with liens transferred to the proceeds and another sale was ordered allowing Petitioner to buy the property in by using his mortgage debt to bid (Pet. App. 33a). No claim was made regarding the rents during that appeal either (R. 302-303).

(the rule that Petitioner urges the Court to adopt) the mortgagee must have suffered a loss or be in the position of needing equitable relief which is inherent in the bankruptcy court. [4]

In this case the record is clear that the property was worth more than Petitioner claims (R. p. 365-367) (R. p. 185-208). This fact in itself takes the case out of the ambit of the rule of the Third and Seventh Circuits. No authority cited by Petitioner would allow the mortgagee to recover rents when he has been made whole by obtaining the property worth more than his debt.

Finally, Respondents respectfully point out that Congress is presently drafting substantive amendments to the Bankruptcy Act and they argue that Congress is in a better position to deal with the problem. This is especially true in light of the authors' comments regarding the Erie Doctrine (4A Collier on Bankruptcy (14th ed.) pp. 169).

Thus, Respondents contend, the facts of this case do not merit review by the Court and Respondents respectfully request that the Petition for a Writ of Certiorari to the Fourth Circuit be denied.

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4 See a Second Circuit case interpreting the Third Circuit Rule, In Re Cigar Stores, 69 F2d 823 (1934); Also see 4A Colliers pp. 167-169.

CONCLUSION

For the reasons stated above it is respectfully submitted that the Petitioner has failed to sustain his burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted.

Thus, Respondents contend, the facts of this case do not merit review by the Court and Respondents respectfully request that the Petition for a Writ of Certiorari to the Fourth Circuit be denied.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that they have this day served a copy of the foregoing Brief For Respondents In Opposition To Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit by depositing copies of the same in the United States mail, postage prepaid, addressed:

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IN THE

SUPREME COURT OF THE UNITED STATES

Fall Term, 1978

No. 77-1410

William E. Butner, Petitioner,

vs.

United States, et al., Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

Petition for Certiorari Filed April 4, 1978
Certiorari Granted June 12, 1978

BRIEF FOR THE PETITIONER

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II. In a Bankruptcy situation, a mortgage-holder should be allowed to reach the rents of the encumbered property to satisfy a deficiency without having to make preliminary attempts to obtain possession of the property and without having to perform actions which substitute therefore 34

III. Even if the rule adopted by the Fourth, Eighth, and Ninth Circuits is the proper rule to follow in a bankruptcy situation, petitioner satisfied the requirements of that rule by obtaining the appointment of a receiver during the Chapter XI proceeding. 41

IV. The Fourth Circuit Court of Appeals committed error in holding that actions performed during a Chapter XI proceeding were not performed "during bankruptcy." 50

V. Regardless of whether a Chapter XI proceeding is part of bankruptcy in general, the Fourth Circuit Court of Appeals erred in holding that the mortgagee had not satisfied the requirements for reaching the rents 55

VI. The Fourth Circuit Court of Appeals in its decision so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision under U. S. Sup. Ct. Rule 19(1)(b), 28 U.S.C. 58

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IN THE

SUPREME COURT OF THE UNITED STATES

Fall Term, 1978

No. 77-1410

William E. Butner, Petitioner,

vs.

United States, et al., Respondents.

On Writ of Certiorari to the United States

Court of Appeals for the Fourth Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The United States Bankruptcy Court sitting in Charlotte, North Carolina, on July 1, 1976, declared the Petitioner to be an unsecured creditor with respect to the rents derived from the encumbered property during bankruptcy. The order of the Bankruptcy Court [App. to Pet. for Cert. pp. 2a-20a] is unreported. The opinion of the United States District Court for the Western District of North Carolina, Statesville Division, reversing and vacating the decision of the Bankruptcy Court [App. to Pet. for Cert. pp. 21a-30a] is unreported. The majority opinion of the United States Court of Appeals for the Fourth Circuit, reversing the judgment of the District Court [App. to Pet. for Cert. pp. 31a-43a] is reported at 566 F.2d 1207 (1977).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was made and entered on December 8, 1977. (App. to Pet. for Cert. pp. 31a-43a) The petition of William E. Butner for a rehearing was denied on January 6, 1978. (App. to Pet. for Cert. p. 44a) The motion of William E. Butner for a stay of mandate pending the filing of a petition for Writ of Certiorari was denied on January 16, 1978. (App. to Pet. for Cert. p. 45a) The petition for a writ of certiorari was docketed on April 4, 1978, and granted on June 12, 1978. The jurisdiction of this Court is invoked under 11 U.S.C. §47(c) and 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, Article I §8, vol. 1 U.S.C., p. XLVII

The Congress shall have power***

Clause 4. To establish an uniform Rule of Naturaliza-

tion, and uniform laws on the subject of Bankruptcies throughout the United States;

11 U.S.C. §752, p. 1248

Where not inconsistent with the provisions of this chapter, the rights, duties, and liabilities of creditors and of all other persons with respect to the property of the debtor shall be the same, where a petition is filed under section 721 of this title and a decree of adjudication has not been entered in the pending bankruptcy proceeding, as if a decree of adjudication had been entered in such bankruptcy proceeding at the time the petition under this chapter was filed, or, where a petition is filed under section 722 of this title, as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed.

11 U.S.C. §776(2), p. 1252

If the statement of the executory contracts and the

schedules and statement of affairs, as provided by paragraph (1) of section 724 of this title, are not duly filed, or if an arrangement is not proposed in the manner and within the time fixed by the court, or if an arrangement is withdrawn or abandoned prior to its acceptance, or is not accepted at the meeting of creditors or within such further time as the court may fix, or if the money or other consideration required to be deposited is not deposited or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused, the court shall--

***

(2) where the petition was filed under section 722 of this title, enter an order, upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this title or dismiss-

ing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors: Provided, however That an order adjudging the debtor a bankrupt may be entered without such hearing upon the debtor's consent.

11 U.S.C. §778, pp. 1252-1253

(a) Upon the entry of an order directing that bankruptcy be proceeded with--

***

(2) in the case of a petition filed under section 722 of this title, the proceeding shall be conducted, so far as possible, in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this chapter was filed; and the trustee nominated by creditors under this chapter shall be appointed by the court, or, if not so nominated or if the trustee so nominated fails to qualify within five days after notice to him of the

entry of such order, a trustee shall be appointed by the court;

***

N. C. Gen. Stat. §1-502(1)

A receiver may be appointed,

(1) Before judgment on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court.

28 U.S.C. Appendix--Rule of the Supreme Court 19(1)(b), p. 7686

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither con-

trolling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

***

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

11 U.S.C. Appendix-Bankruptcy Rule 201(a), p. 1304

Purposes and Term of Receivership. Subject to the

provisions of this rule, the court may appoint a receiver when necessary in the best interest of the estate (1) to take charge of the property of a bankrupt; (2) to conduct the business of the bankrupt; or (3) to afford representation to the estate in an action, adversary proceeding, or contested matter when no trustee has qualified or the interest of the trustee may be adverse to that of the estate. Such appointment shall be terminated when the trustee qualifies or there is no further need for a receiver, and the authorization to conduct the business of the bankrupt after adjudication shall continue only for such time as may be in the best interest of the estate and consistent with orderly liquidation.

11 U.S.C., Appendix-Bankruptcy Rule 601(e), p. 1335

(e) Availability of Other Relief. Nothing in this rule precludes the issuance of, or relief from, any stay, restraining order, or injunction when otherwise authorized.

11 U.S.C. Appendix-Bankruptcy Rule 701, p. 1340

The rules of this Part VII govern any proceeding instituted by a party before a bankruptcy judge to (1) recover money or property, other than a proceeding under Rule 220 or Rule 604, (2) determine the validity, priority, or extent of a lien or other interest in property, (3) to sell property free of a lien or other interest for which the holder can be compelled to take a money satisfaction, (4) object to or revoke a discharge, (5) obtain an injunction, (6) obtain relief from a stay as provided in Rule 401 or 601, or (7) determine the dischargeability of a debt. Such a proceeding shall be known as an adversary proceeding.

QUESTIONS PRESENTED

I. Does the split among the circuits on the question of the necessary prerequisites before a mortgagee can reach the rents of encumbered property to satisfy a deficiency violate Article I, Section 8, Clause 4 of the United States Constitution?

II. Should a mortgageholder in a Bankruptcy situation be required to make preliminary attempts to obtain possession of the property or to perform actions which substitute for possesion before he can reach rents of encumbered property to satisfy a deficiency?

III. Did petitioner satisfy the requirements of the Fourth, Eighth and Ninth Circuits by obtaining the appointment of a receiver?

IV. Did the Fourth Circuit Court of Appeals commit error in holding actions performed during a Chapter XI proceeding were not performed "during bankruptcy?"

V. If a Chapter XI proceeding is not a part of bankruptcy, did Petitioner establish his right to the rents by obtaining the appointment of a receiver before bankruptcy?

VI. In its opinion in this case did the Fourth Circuit Court of Appeals so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory power?

STATEMENT OF THE CASE

William E. Butner, Robert L. McKaughn, Jr., and Jack Sipe Construction Company held a second mortgage in the amount of $360,000.00 on real property owned by Golden Enterprises, Inc., a North Carolina corporation. Since that time Robert L. McKaughn, Jr., and Jack Sipe Construction Company have assigned all of their right, title and interest in the indebtedness and deeds of trust to William E. Butner, the Petitioner herein, thus making him the sole second mortgageholder.

On May 4, 1973, Golden Enterprises, Inc., filed a petition in bankruptcy for an arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C. Section 701, et seq. While the Chapter XI proceeding was pending, on April 7, 1974, upon motion by William E. Butner, Robert L. McKaughn, Jr., and Jack Sipe Construction Company to secure the debt to them in the amount of $360,000.00, and upon their agreement

that they would not attempt to foreclose their deed of trust without Court approval, the Honorable Joseph R. Cruciani, Bankruptcy Judge, ordered that the note and deed of trust to them from Golden Enterprises, Inc., should be in the original amount of $360,000.00, reduced the rate of interest from twelve percent to ten percent per annum and further ordered "That the holders of the note or any assignee thereof shall not attempt to file a petition to reclaim or to foreclose except upon motion to this Court setting forth the reasons therefore." (App. p. 196a)

On April 17, 1974, the first and second mortgageholders sought the appointment of an agent to collect the rental income from Golden Enterprises' property. (App. pp. 202a-203a) On April 18, 1974, the Honorable Joseph R. Cruciani, Bankruptcy Judge, appointed Simon Joseph Golden as agent "to receive all income derived from debtor's real estate" and to apply that income to the payment of interest and principal on the

second mortgage as well as to other enumerated debts of the corporation. (App. pp. 204a-206a)

A plan of arrangement was never confirmed, and on February 14, 1975, Golden Enterprises, Inc., was adjudged a bankrupt, and the Honorable Joseph R. Cruciani appointed Joe N. Cagle as Trustee to take charge of the real estate and "to collect and receive all rents, issues, income and profits . . . due or to become due to the within estate, and to hold and retain all monies thus received to the end that the same may be applied under this or different or further orders of this Court . . . ." (App. pp. 342a-343a)

The first mortgage payments had been kept current during the Chapter XI proceeding, but in February, 1975, the Trustee ceased making payments on the first mortgages, allegedly pursuant to an oral order issuing from someone in the office of the Bankruptcy Judge, although there is no direct evidence that any such further order was entered.

There now remains in the Trustee's hands approximately $162,971.32, all of which is rental income from the real property since the personal property was disposed of during the Chapter XI proceeding and its proceeds paid out to other creditors.

During the Bankruptcy proceeding, the second mortgageholder orally sought abandonment of the property to him. The Bankruptcy Judge gave repeated oral assurances to the second mortgageholder that, if, when the property was sold, the sale did not bring enough money to pay the first and second mortgage debts, he would not confirm the sale but would abandon the property. In the meantime, the Judge refused to abandon the property. At the first meeting of the creditors, the trustee suggested abandonment to the second mortgageholder and the second mortgageholder also urged this course of action. (App. pp. 384a, 390a-391a) The Judge indicated that he would abandon the property if the sale proceeds were in-

sufficient to pay the mortgage debts [App. p. 388a] and indicated in addition that he was refusing to abandon the real estate because of his concern over how the costs of administration would be paid. (App. pp. 391a, 399a-400a)

The real estate was sold at public auction on July 28, 1975, and the sale of two of the tracts was confirmed. William E. Butner appealed to the United States District Court for the Western District of North Carolina, Statesville Division.

After hearing the appeal, the Honorable Woodrow W. Jones, Judge, on November 7, 1975, ordered the Trustee to resell the real estate at public auction free and clear of all liens and encumbrances except the first deeds of trust thereon. Judge Jones further ordered that the second mortgageholder be allowed to use the outstanding principal balance of his Deed of Trust to bid at the bankruptcy resale.

At the resale, November 12, 1975, William E. Butner

became the last and highest bidder for the property, with a bid of $174,000.00, thus leaving a balance due on his note of $186,000.00. However, at the final meeting of creditors to determine the distribution of the $162,971.32 in rents held by the Trustee, the Honorable Marvin R. Wooten, Bankruptcy Judge, declared the second mortgageholder a general creditor with respect to the balance due on his note while awarding, almost without exception, all claims arising during the Chapter XI proceeding as priority claims. (App. to Pet. for Cert., pp. 2a-20a)

William E. Butner appealed this order to the United States District Court for the Western District of North Carolina, Statesville Division, where the Honorable Woodrow W. Jones, Chief Judge, reversed and vacated the Bankruptcy Judge's finding of William E. Butner's unsecured status as to the rents derived from the encumbered property. (App. to Pet. for Cert., pp. 21a-30a) From this order the United States and the Trustee,

et al. appealed to the United States Court of Appeals for the Fourth Circuit where the United States' appeal on its tax claim was consolidated with the appeal of the Trustee, et al. for briefing and argument. The appeal was heard on October 4, 1977, and on December 8, 1977, the Fourth Circuit Court of Appeals, Senior Circuit Judge Bryan dissenting, reversed the judgment of the United States District Court and remanded the case for compliance with the final order of Judge Wooten. (App. to Pet. for Cert. pp. 31a-42a) William E. Butner's petition for a rehearing was denied on January 6, 1978, [App. to Pet. for Cert. p. 43a] and his motion for a stay of mandate pending petition for writ of certiorari to the United States Supreme Court was denied on January 16, 1978. (App. to Pet. for Cert. p. 44a) William E. Butner petitioned the United States Supreme Court for a writ of certiorari on March 28, 1978, and certiorari was granted on June 12, 1978.

SUMMARY OF ARGUMENT

I.

There is a split of authority among the Federal courts on the question of what a mortgageholder in a bankruptcy situation has to do to reach the rents from the encumbered property in order to satisfy a deficiency. Some circuits, notably the Third and Seventh, say the mortgageholder can reach those rents as a matter of course. Other circuits, including the Eighth and Ninth, say that the mortgagee must first have taken actual possession of the encumbered property or, if bankruptcy prevents, this, he must perform an act equivalent to taking possession such as obtaining a sequestration order or the appointment of a receiver to collect the rents. In the instant case, the Fourth Circuit aligned itself with the Eighth and Ninth Circuits saying that this position would lead to a result which was most consistent with the result under state law.

Petitioner submits that this split in authority violates Article I, Section 8 of the United States Constitution which provides for a uniform law of bankruptcy. The rule in this area is that federal courts will apply state law whenever it does not conflict with the federal bankruptcy law, but if there is a conflict, the federal law prevails. Stellwagen v. Clum, 38 S.Ct. 215, 245 U.S. 605, 62 L.Ed. 507 (1918). Petitioner submits that bankruptcy, by its very nature, interferes with the state-law mortgage relationship to such an extent that it destroys the relationship and that, being in conflict with the federal law, the State law is preempted in this area. Thus the federal law controls the question, and the difference in its application by the various circuits amounts to a non-uniform law of bankruptcy which is unconstitutional. The Supreme Court should state the proper rule to be followed to dispose of the present unconstitutional split of opinion.

II.

Petitioner submits that the better rule is that adopted by the Third and Seventh Circuits. In this kind of situation a mortgageholder should be able to reach the rents of encumbered property to satisfy a deficiency without the preliminary attempts to take possession or any actions which substitute for taking possession. The policy behind the requirement of taking possession is that doing so would stop any mismanagement of the property by the debtor which might be adversely affecting its value and would keep the deficiency from mounting. This policy is inapplicable in bankruptcy when the property is under the control and supervision of the court especially when, as in the instant case, the decline in value of the property securing the mortgage resulted in part from actions of the bankruptcy court with respect to the property.

The rule adopted by the Fourth, Eighth and Ninth Circuits furthers the games-playing theory of litigation

by stressing form over substance and may unfairly defeat a secured creditor's right to have his claim paid if the creditor is not aware of the technical rules of the particular jurisdiction with respect to claiming rents.

In addition the rule also discounts the fact that one of the prime considerations of a lender is the income-producing capacity of the property intended to secure the loan. Given the importance of the income in deciding whether to loan, it is unfair then to deny the lender access to the income to satisfy his claim.

III.

Even if the Court decides that the rule of the Fourth, Eighth and Ninth Circuits is the proper rule, Petitioner did enough to secure his claim to the rents under that rule by obtaining the appointment of a receiver during the Chapter XI proceeding, and thereafter he was not obliged to take further action to the same end.

IV.

The Fourth Circuit Court of Appeals in the instant

case held that petitioner's obtaining appointment of a receiver during the Chapter XI proceeding did not establish his right to the rents because it was not done "during bankruptcy" thus ruling sub silentio that Chapter XI proceedings are not a part of bankruptcy. Petitioner submits that this is error and points out the many carryovers in the bankruptcy act itself including the identical nature of the rights, duties and liabilities of creditors in Chapter XI and bankruptcy proceedings, the provisions for conversion and the relation back of the adjudication of bankruptcy in cases of conversion to the date the Chapter XI petition was filed. Petitioner points out factual connections between the two proceedings here, including the carryover effect of the order appointing the Trustee and the fact that all the parties and the supervising Bankruptcy Judge were the same in both, and submits that the two proceedings are on a continuum with each other within one overall scheme which is "bankruptcy." Further Petitioner

points out that the effectiveness of the Chapter XI receivership order did not have to carry over to the straight bankruptcy proceeding, for the thing which establishes his rights here is the act of having had the receiver appointed in the first place.

V.

According to Volume 4A of Collier on Bankruptcy [¶ 70.16 at 159-161 (1976)] and the Eighth and Tenth Circuits, securing the appointment of a receiver before bankruptcy also gives the mortgageholder the right to the rents if such an action is acceptable under state law. N. C. Gen. Stat. § 1-502(1) authorizes the appointment of a receiver in a situation such as the one encountered by the second mortgageholder here. Thus if the Fourth Circuit is right in holding Chapter XI proceedings are not part of bankruptcy, then Petitioner's actions during the Chapter XI proceeding were performed before bankruptcy, and he is entitled to the rents.

VI.

The Fourth Circuit's opinion rules on one hand that Petitioner is not entitled to the rents because his actions to secure them took place during Chapter XI proceedings which are not a part of bankruptcy. On the other hand, it reinstated the order of the Bankruptcy Judge below which awarded as priority claims attorney and accountant's fees generated by work done during Chapter XI. If Chapter XI actions are not part of bankruptcy where Petitioner is concerned, they cannot be part of bankruptcy where the attorneys and accountants are concerned. This inconsistency is such as to require the Supreme Court to exercise its supervisory power over the lower federal courts to resolve it.

ARGUMENT

I. <u>The split among the circuits on the question of the necessary prerequisites for a mortgageholder's reaching the rents of the encumbered property to satisfy a deficiency violates Article I, Section 8,</u>

Clause 4 of the United States Constitution and thus the split should be resolved by the Supreme Court.

In the United States today, state laws espouse one of three theories on the nature of a mortgage transaction. In most cases these theoretical differences do not cause any difference in result; however, in one area the mortgage theory of the particular jurisdiction is important. "In a few states, known as title states, the mortgagee has the continuing right to possession, as he does in England. In one or two other states, known as 'hybrid' or 'intermediate' theory states, the mortgagee is entitled automatically to possession immediately upon default. Everywhere else, the mortgagee must petition the court for the right to take possession--via a court appointed receiver--to protect the security from waste or dissipation of the rents; usually the petition is received and granted as part of a foreclosure proceeding." A. Axelrod, C. Berger and Q. Johnstone, Land Transfer and Finance Cases and Materials,

138, n. 23 (1971). The right of the mortgagee to reach the rents of the mortgaged property arises from his possession of the property and thus is affected by the mortgage theory of the particular jurisdiction. Under North Carolina law the mortgagor is entitled to the rents of the encumbered property, even after default, until the mortgagee takes possession of the property. Gregg v. Williamson, 246 N.C. 356, 98 S.E. 2d 481 (1957). Therefore, normally, in North Carolina when a mortgagor defaults, the mortgagee sues to foreclose the mortgage, obtains possession of the property and thus is able to reach the rents of the encumbered property.

However, if the mortgagor files a petition in bankruptcy and the Bankruptcy Court issues a stay of all foreclosure proceedings, the mortgagee is cut off from his remedy under state law. If the ensuing bankruptcy sale of the land does not generate enough money to pay the mortgage, then the bankruptcy courts will allow

the mortgageholder to reach any accumulated rents attributable to the property to satisfy the deficiency. However, there is a split of authority among the Federal circuit courts as to how a mortgagee may become eligible to reach the rents to satisfy a deficiency. The Third and Seventh Circuits simply allow a secured creditor to reach the rental income. In re Pittsburg Duquesne Development Co., 482 F.2d 243, 246 (3d Cir. 1973); In re Wakey, 50 F.2d 869 (7th Cir. 1921). The Eighth and Ninth Circuits hold that the mortgagee has no right to the rents unless he has taken possession of the property. Since a mortgagee cannot take possession of property which is under the control of the bankruptcy court, these circuits allow the mortgagee to secure his right to the rentals by performing other actions as a substitute for taking possession. Tower Grove Bank & Trust Co. v. Weinstein, 119 F.2d 120 (8th Cir. 1941); In re Hotel Saint James Co., 65 F.2d 82 (9th Cir. 1933). Such actions include petitioning for a sequestration order, getting a receiver appointed to collect the rents, or obtaining the court's consent to a foreclosure. Pollack v. Sampsell, 174 F.2d 415 (9th Cir. 1949); Mortgage Loan Co. v. Livingston, 45 F.2d 28 (8th Cir. 1930); 4A Collier on Bankruptcy (14th ed.) ¶ 70.16 at 150-163 (1976). By its decision in the instant case, the Fourth Circuit Court of Appeals has aligned itself with the Eighth and Ninth Circuits, saying in its opinion that "[it] best ensures that the outcome in federal court will parallel the result that would obtain in state court had bankruptcy proceedings not been instituted." (App. to Pet. for Cert., p. 35a)

Petitioner submits that this split among the circuits as to the prerequisites for reaching rents of encumbered property to satisfy a deficiency violates Article I, Section 8, Clause 4 of the Constitution of the United States which empowers Congress "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." Vol. 1 U.S.C. p. XLVII.

With respect to this clause of the Constitution, this Court has stated "In view of this grant of authority to the Congress, it has been settled from an early date that state laws to the extent that they conflict with the laws of Congress, enacted under its constitutional authority, on the subject of bankruptcies are suspended. While this is true, State laws are thus suspended only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress." Stellwagen v. Clum, 38 S.Ct. 215, 217, 245 U.S. 605, 613, 62 L.Ed. 507, 511 (1918). The idea behind this suspension of state law is of course that Congress has by its bankruptcy legislation preempted certain areas of the law and has thus left no room for the operation of state law. If the state law does not conflict with the Federal law, it is not preempted. For example, in the Stellwagen case above, the Court used state law to avoid a transfer where the transferee might otherwise have had a claim under the Federal Bankruptcy law.

The Court in the Stellwagen case went on to clarify the uniformity requirement. "Notwithstanding this requirement as to uniformity, the bankruptcy acts of Congress may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different states." Stellwagen v. Clum, supra. For example in this context the courts have applied state law to determine whether a mortgagee after an unconfirmed foreclosure sale has a property right with which Congress cannot interfere [U.S. National Bank of Omaha v. Pamp, 83 F.2d 493 (8th Cir. 1936)]; and to determine the time of vesting of a mortgagee's rights in the property [In re Lowman, 79 F.2d 887 (7th Cir. 1935)].

In the cases where the Court has applied state law in a Bankruptcy situation, the state law applied has had merely collateral relevance to the Court's decision and has not been directly concerned with the heart of the issue, for, in the latter situation, the Bankruptcy

law would supercede it.

Petitioner submits that, once the mortgagee is stayed from foreclosing his mortgage, the Bankruptcy law has disrupted the mortgage relationship to such an extent that it preempts the field and leaves no room for state requirements vis a vis the right to rents from encumbered property. The normal sequence of events is default, mortgagee seeking foreclosure and right to take possession, and foreclosure with the right to reach the rents. If Bankruptcy intervenes and denies the right to seek foreclosure, the sequence is completely disrupted. The Federal Courts who attempt to substitute other actions for the taking of possession are in essence trying to create state law and end up with a rule which is neither state law nor Federal law since state law requires taking possession and the Bankruptcy Act requires nothing. Deference to state law by the creation of such a rule is also unnecessary because, if Federal law prevents taking possession of the property, then there is nothing left for the state law to act upon, and since the state law is in conflict with the Federal law, it must yield as Federal law has preempted the field on that question. The state law having yielded to the federal law, any attempt by the Federal courts to give new effect to the state law is also contrary to the idea of preemption, and since not all federal circuit courts have adopted the rule, the split among the circuits with respect to this matter violates the uniformity clause in Article I, Section 8 of the United States Constitution.

In order to be uniform in this area, the Bankruptcy law cannot destroy the means of obtaining a right to the rents and leave standing the state requirement of the now-impossible act in one jurisdiction while not doing anything to affect a mortgagee's right to the rents in another jurisdiction. And in the same way, the court in a Bankruptcy situation cannot create prerequisites to obtaining rents in one jurisdiction while imposing

no such conditions in another jurisdiction.

Thus the split among the circuits here is unconstitutional and should be resolved by this Court.

II. In a Bankruptcy situation, a mortgageholder should be allowed to reach the rents of the encumbered property to satisfy a deficiency without having to make preliminary attempts to obtain possession of the property and without having to perform actions which substitute therefor.

The only time the question of allowing a mortgageholder to reach rents of the encumbered property arises is where the proceeds of the bankruptcy sale do not fully satisfy the mortgage debt thus leaving the mortgagee with a deficiency. The fact that this is a bankruptcy situation is important in demonstrating why the mortgagee should not be required to make preliminary attempts to take possession.

In a normal foreclosure action, the mortgagee could sue the mortgagor for the deficiency. However, the

fact that bankruptcy proceedings include a stay of all suits against the debtor precludes this means of relief.

Allowing a mortgagee to reach the rents from the property which secures his mortgage should not be seen as taking money away from the unsecured creditors. He has loaned money in the amount of the mortgage and taken security for the debt. If he is unable to recover the difference between his debt and the amount generated by the bankruptcy sale of the land securing it, he has lost that money, and given that a deficiency results only when the value of the security declines, he cannot be blamed and should not be penalized for the drop in value of his security in a bankruptcy situation where the existence of the bankruptcy situation has to a great extent caused the drop in value. In a bankruptcy situation, rents which might normally have been reinvested in the upkeep of the property to preserve its value are instead being held by the Court.

In the instant case, the Court allegedly ordered the Trustee to stop making payments on the first and second mortgages. These payments were stopped in February, 1975 [App. pp. 346a-352a], and, by the time the bankruptcy sale was held, the mortgages were greatly in arrears. Furthermore, the court delayed selling the property, mainly to collect enough rents to defray the costs of administration and partly in hopes that the economic situation would improve. Each month's delay threw the mortgages further in arrears. In addition the delay meant that the financial institutions holding the first mortgages were under pressure by the Federal bank examiners to get their mortgages paid as soon as possible. Thus the moment the bankruptcy sale was confirmed they wanted immediate payment of all the arrears and were not disposed to give a buyer much time to get the money together. This meant that any buyer would have to come up with large sums of cash almost immediately at a time of economic recession

with money not readily available. All of these factors, most of which arose as a result of actions of the bankruptcy court, reduced the value of the property to the point that the bankruptcy sale did not bring enough to pay the second mortgage in full.

The idea behind requiring a mortgageholder to take possession of the encumbered property before he can reach its rents to satisfy his debt is that, if the land is declining in value because it is being mismanaged by the debtor, the creditor can stop this decline by taking possession of it himself. This idea has no application in a bankruptcy situation because the Court is in possession of the land. In this case the mortgageholder tried to obtain possession of the property through abandonment at a time when the mortgages were not too badly in arrears and could have been brought up to date to stop the land from declining in value. However, he was unsuccessful in his attempts. If the actions by the Bankruptcy Court are at least partly

to blame for the decline in value of the security and the bankruptcy court refuses to grant possession of the property to the mortgageholder at a time when the decline in value can be slowed or halted, the mortgageholder should not be penalized for the decline in value by being denied access to the rents to satisfy a deficiency.

The rule adopted by the Fourth Circuit in this case furthers the games-playing approach to litigation which the courts, the Congress and the legislatures of the states have been attempting to do away with by revision of the rules of civil procedure and other statutes with an emphasis on the consideration of substance over form and on the idea that a worthy claim should not be defeated by a technical rule in a situation where the rule has no rational application. Under the rule adopted here, a creditor who has not read the fine print about the split between the circuits on this issue or whose lawyer is not highly specialized in bankruptcy law, is penalized for failing to do something

which he would not have to do if the property in which he holds a security interest were located in another state. A possible justification for applying the rule in a bankruptcy contest is that, in a situation where there are many claims and few assets, it gives an indication of the diligence with which a creditor is pursuing his claim and rewards the one who pursues his claim the most vigorously. This application of the rule is unfair. By making the effort and incurring extra expense to obtain security for his debt, a secured creditor has already indicated a diligence which is not shown by the unsecured creditors. Of course there must be enough action on the part of the creditor to make it clear that he has a claim and is not waiving it, but when the newly-adopted Fourth Circuit rule is applied, it turns the Bankruptcy proceeding into a game with all the unsecured creditors waiting to pounce on the assets if a secured creditor fails to satisfy every technical requirement along the

way and ignores the fact that his original efforts to secure his debt at its inception should entitle him to some priority.

The rule also discounts the importance of the income-producing capacity of the property in connection with the mortgage transaction. The ability to produce income is one variable in the determination of the value of a piece of property prior to taking a mortgage on it. If the property could not be rented or if no business could be operated thereon, the amount for which the property could be mortgaged would be less. In making a loan and taking a mortgage on real estate of this type, the lender looks in great measure to the income being produced by the property to see if the mortgagor can make the mortgage payments from that income. The ordinary lender does not enter into a mortgage transaction with the idea that the mortgagor will be unable to repay the loan, thus making foreclosure necessary, since foreclosure is an extreme and ex-

pensive means of obtaining satisfaction of a debt. Given that the income-producing ability of a piece of real estate is a prime consideration in the acceptance of a mortgage on that property as security for a loan, it seems only fair that a secured party be able to satisfy a claim in bankruptcy from accrued rents attributable to that property once the proceeds of the bankruptcy sale of the property have been exhausted.

III. Even if the rule adopted by the Fourth, Eighth and Ninth Circuits is the proper rule to follow in a bankruptcy situation, petitioner satisfied the requirements of that rule by obtaining the appointment of a receiver during the Chapter XI proceeding.

The Eighth and Ninth Circuit rule which the Fourth Circuit adopted in the instant case requires a court to consider four factors in determining whether a mortgagee has established a right to the rental income from the encumbered property: (1) the nature of the mortgage transaction under applicable state law; (2)

the terms of the mortgage itself; (3) the acts of the parties thereunder and (4) whether equitable considerations as applied by the Federal Bankruptcy Court may alter the result. 4A Collier on Bankruptcy, (14th ed.) ¶ 70.16 at 157 (1976).

Petitioner submits that the state law of mortgages on this question is not applicable in a bankruptcy situation as more fully discussed in Argument I above. However, the law of North Carolina, if applicable, provides that the mortgagor is entitled to rents of encumbered property after default until the mortgagee takes possession of the property. Gregg v. Williamson, 246 N.C. 356, 98 S.E. 2d 481 (1957). The terms of the mortgage in this case do not address the issue of the right to the rents and thus provide no assistance in its resolution.

With regard to the actions of the parties, petitioner could not take possession of the property prior to the institution of the Chapter XI proceeding because

his mortgage was not then in default. It remained current up to the time when the Bankruptcy Judge confirmed the amount of the second mortgagees' claim and ordered "That the holders of the note or any assignee thereof shall not attempt to file a petition to reclaim or to foreclose except upon motion to this Court setting forth the reasons therefor." (App. p. 196a)

Thereafter, when the debtor did not make one of the required monthly interest payments on the second mortgage, the mortgagee had to perform one of the actions which are allowed by the Eighth and Ninth Circuits to substitute for taking possession: petitioning for a sequestration order, getting a receiver appointed to collect the rents or obtaining the court's consent to a foreclosure. Pollack v. Sampsell, 174 F.2d 415 (9th Cir. 1949); Mortgage Loan Co. v. Livingston, 45 F.2d 28 (8th Cir. 1930); 4A Collier on Bankruptcy (14th ed.) ¶70.16 at 150-163 (1976). The second mortgageholders, together with the first mortgage-

holders sought and obtained the appointment of an agent to collect the rental income from Golden Enterprises' property. (App. pp. 202a-203a) The agent was ordered "to receive all income derived from debtor's real estate" and to apply that income to the payment of certain enumerated debts including the payment of interest and principal on the second mortgage. (App. pp. 204a-206a) Having done this they had satisfied the requirements of the rule and were not thereafter required to perform other actions to the same end.

The Trustee et al. maintain that petitioner should have filed an adversary proceeding to recover the property on which he held a mortgage. They also cite, as an indication that petitioner was not claiming the rents, petitioner's failure to file answer to an adversary proceeding filed by the Trustee for authority to sell the property free and clear of liens.

Petitioner submits that, having secured the appoint-

ment of a receiver he was not required to perform additional acts to establish his claim to the rents. Bankruptcy Rule 701, which deals with adversary proceedings, indicates itself that an adversary proceeding is not the sole method of relief in this situation. At first glance three subdivisions of Rule 701 seem to apply. An adversary proceeding may be instituted "(1) to recover money or property, *** (2) determine the *** extent of a lien, (6) obtain relief from a stay as provided in Rule *** 601 ***." 11 U.S.C. Appendix-Bankruptcy Rule 701, p. 1340. The advisory committee's note on the rule indicates that subdivision (1) applies to the avoidance of transfers by the bankrupt, such as voidable preferences, transfers in fraud of creditors within four months of bankruptcy and also to a secured party's reclamation of property where he was already in actual possession at the time bankruptcy proceedings were instituted.

According to Black's Law Dictionary, "extent" means

"amount," and thus the phrase "extent of a lien" in subdivision (2) refers only to the amount of a lien and not to the sources from which it may be satisfied. Black's Law Dictionary 694 (4th ed. 1968).

The applicable section of Rule 701 in this case is (6), "to obtain relief from a stay as provided in Rule *** 601 ***." However Bankruptcy Rule 601(e) provides "Nothing in this rule precludes the issuance of, or relief from, any stay *** when otherwise authorized." 11 U.S.C. Appendix-Bankruptcy Rule 601, p. 1335. The advisory committee's note explains with respect to Rule 601(e), "The stay provided by this rule is in no way a limitation on the discretion and power of the court of bankruptcy under § 2a(15) of the Act to grant or deny or modify relief in the nature of an injunction." 11 U.S.C. Appendix-Bankruptcy Rule 601, Advisory Committee's Note, p. 1336. The second mortgageholders were under a court order not to attempt to reclaim or foreclose on their own.

Petitioner on several occasions did orally request the court to abandon the property to the second mortgageholders.

Petitioner does not necessarily argue that oral requests for abandonment were sufficient to establish his rights, for he submits those rights were already established when the receiver was appointed. However, the law does not require a useless act so he does argue that under the wording of Bankruptcy Rules 701 and 601 and the explanatory notes associated with each rule, his right to the rents was not destroyed by his failure to file an adversary proceeding.

As mentioned above the second mortgageholders had orally requested abandonment of the property to them several times. The bankruptcy judge indicate to them that, if the bankruptcy sale did not bring enough money to satisfy the second mortgage, he would abandon the property to the second mortgagees. There is only one instance when the request and reply

are a matter of record. At the first meeting of creditors, the Trustee suggested that the Court consider abandoning the property to the second mortgageholders. (App. p. 384a) Petitioner Butner joined in the suggestion, encouraging the Court to use its equitable powers to abandon the property to the second mortgageholders at the earliest possible time. (App. p. 390a-391a) The judge indicated that his hesitancy to abandon the property was due to a concern over how the administration expenses would be paid if he did so. (App. pp. 391a, 399a-400a) However the judge indicated that if the real estate sale proceeds were insufficient to pay the first and second mortgages, he would abandon the property to the mortgage holders. (App. p. 388a) The second mortgagee was relying on these comments by the judge both in the first meeting of creditors and on other occasions. Thus he had no reason either to attempt to file an adversary proceeding of his own or to answer the adversary proceeding

which the Trustee filed to obtain the authority to sell the land. The Trustee wanted to sell and the second mortgagee also wanted the sale since he had reason to believe that either the sale would bring enough to pay his claim or the sale would not be confirmed and the property would be abandoned to him.

The Trustee et al. argued below that equitable considerations should bar Petitioner from reaching the rents here because he sold one of the pieces of property obtained at the Bankruptcy Resale for one million dollars. The Court of Appeals for the Fourth Circuit apparently relied on this argument to some extent in its decision below. (App. to Pet. for Cert. p. 37a) Petitioner maintained and still maintains that the question at issue was merely whether his actions had been sufficient to establish the right to reach the rents to satisfy any deficiency and not what the amount of that deficiency might be since the part of the order which was originally appealed was that which declared

him an unsecured creditor with respect to the balance of his claim. He also maintained, and still maintains, that any profit made on the later sale is not relevant to the determination of the deficiency owed. Petitioner was not the sole bidder at the bankruptcy resale; thus the final bid at the resale represents the actual value of the property encumbered by a first mortgage which was badly in arrears. Petitioner subsequently made payments on the first mortgage and eventually paid it off, thus increasing the value of the property by his own efforts. The Affidavit of the Trustee [App., p. 775a] is based purely on information contained in the public records of the county in which the property is located and in no way represents the costs incurred by the Petitioner.

IV. The Fourth Circuit of Appeals committed error in holding that actions performed during a Chapter XI proceeding were not performed "during bankruptcy."

The Fourth Circuit in its opinion said that there was no attempt made to sequester rents or have a receiver appointed "during bankruptcy" thus holding in effect that a Chapter XI proceeding is not a part of bankruptcy. (App. to Pet. for Cert. p. 36a)

When the Chapter XI proceeding was converted to a straight bankruptcy, the order appointing a Trustee provided that he was to collect and hold the rents so that they might be applied "under this, or different or further orders of this court." (emphasis supplied). (App. p. 342a-343a) Petitioner submits that this order carried over the effectiveness of the order appointing the Chapter XI receiver so that the Trustee was holding the rents at least in part for the benefit of the second mortgageholders. It is true that he was making no mortgage payments, but it does not follow that he was not holding the funds for their ultimate benefit. One of the functions of a Trustee is to collect and hold monies to satisfy the claims of those entitled

to the funds. If the second mortgagee is held to be entitled to the funds then the Trustee will have been holding them for his benefit. It should be noted that the sole asset being held by the Trustee in Bankruptcy was rents derived from the mortgaged property. Thus there is no question of commingling of funds in this case.

Petitioning for the appointment of a separate receiver in this case would have been pointless. According to Bankruptcy Rule 201(a), the only time that a receiver can be appointed after the appointment of a Trustee is to "(3) afford representation to the estate in an action, adversary proceeding or contested matter when *** the interest of the trustee may be adverse to that of the estate." 11 U.S.C. Appendix-Bankruptcy Rule 201(a), p. 1304. This section is not applicable to the situation in this case and petitioning for the appointment of a receiver would have been futile. Surely the law would not require a mortgagee to perform futile acts in order

to maintain an already-established right, especially when the Trustee is performing the collection, protection and holding functions of a receiver.

Even if the Chapter XI proceeding is held to be separate from a straight bankruptcy to the extent that actions in one do not carry over in effectiveness to the other, the later conversion to straight bankruptcy, as noted by Senior Circuit Judge Bryan in his dissent below, would not cancel the effect of the action having been performed. Here it is the action itself which establishes the claim and not the duration of its consequences. (App. to Pet. for Cert., p. 40a)

With respect to the relationship between Chapter XI and straight bankruptcy proceedings for purposes of determining if acts performed during the Chapter XI proceeding here were done "during bankruptcy," the Petitioner submits that the two proceedings are on a continuum and that "bankruptcy" encompasses the whole system rather than individual proceedings

therein. Chapter XI is physically part of the bankruptcy title of the United States Code. Rights, duties and liabilities of creditors in Chapter XI proceedings are identical to those in straight bankruptcy proceedings. 11 U.S.C. §752, p. 1248. If a Chapter XI arrangement is not confirmed, the debtor may be adjudged a bankrupt, and the court may direct that straight bankruptcy be proceeded with pursuant to the provisions of Title 11 of the United States Code. 11 U.S.C. § 776(2), p. 1252. When a Chapter XI proceeding is converted to straight bankruptcy, the proceeding is handled as if the adjudication of bankruptcy was entered when the Chapter XI petition was first filed. 11 U.S.C. 778(a)(2), pp. 1252-1253. The technical term used when a Chapter XI proceeding gives way to a straight bankruptcy proceeding is "conversion," which implies simply a change in aspect of one proceeding rather than a total end to one proceeding followed by the beginning of a new, entirely unrelated

proceeding. In this case another index of unity is that the same bankruptcy judge presided over the arrangement and the straight bankruptcy. While a Chapter XI proceeding does not always lead to a straight bankruptcy and a straight bankruptcy does not always begin as a Chapter XI proceeding, it is submitted that the two proceedings are interrelated in a larger overall scheme rather than being completely separate entities.

V. Regardless of whether a Chapter XI proceeding is part of bankruptcy in general, the Fourth Circuit Court of Appeals erred in holding that the mortgagee had not satisfied the requirements for reaching the rents.

According to Collier on Bankruptcy, as discussed above, "Once bankruptcy has begun, the mortgagee may, if he has done nothing up to that time, take the following steps to secure the rents and profits: (1) obtain from the bankruptcy court the appointment of a receiver to collect the rents for the benefit of the

mortgagee ***." 4A Collier on Bankruptcy (14th ed.) ¶ 70.16 at 161 (1976), citing as authority Tower Grove Bank & Trust Co. v. Weinstein, 119 F.2d 120 (8th Cir. 1941).

However, Collier also says "If therefore prior to bankruptcy, the mortgagee has secured possession, commenced foreclosure proceedings, secured the appointment of a receiver for the property, or has in any other manner acceptable under the mortgage and applicable state law sequestered or attached the rents and profits, it is clear *** that the mortgagor's trustee has no rights as to such rents and profits from the property when bankruptcy ensues." (emphasis supplied). 4A Collier on Bankruptcy (14th ed.) ¶ 70.16 at 159-161 (1976), citing as authority Mortgage Loan Co. v. Livingston, 45 F.2d 28 (8th Cir. 1930); New Orleans Compress, Inc. v. Katz, 185 La. 723, 170 So. 244 (1936); Central States Life Ins. Co. v. Carlson, 98 F.2d 102 (10th Cir. 1938); First Savings

Bank v. Stuppi, 2 F.2d 822 (8th Cir. 1924).

If a Chapter XI proceeding is not part of bankruptcy, then in this case, actions taken during the Chapter XI proceeding were performed prior to bankruptcy and would thus establish the mortgagee's right to the rents under the above-stated rule.

North Carolina General Statute § 1-502(1) provides as follows:

"A receiver may be appointed, (1) Before judgment on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; ***." N.C. Gen. Stat §1-502(1), Vol. 1A, p. 524.

Thus it is clear that before bankruptcy in this case, obtaining the appointment of a receiver would have been acceptable under the state law. For the above reasons petitioner submits that even if the appointment

of a receiver were not obtained "during bankruptcy" the Fourth Circuit committed error in holding that obtaining the receiver's appointment did not establish petitioner's claim to the rents since, if the appointment were not during bankruptcy, it must necessarily have taken place prior to bankruptcy.

VI. The Fourth Circuit Court of Appeals in its decision so far departed from the accepted and usual course of judicial proceedings as to call for and exercise of the Supreme Court's power of supervision under U.S. Sup. Ct. Rule 19(1)(b), 28 U.S.C.

There is an inescapable contradiction in the opinion of the Fourth Circuit Court of Appeals here. On the one hand they rule sub silentio that a Chapter XI proceeding is not a part of the Bankruptcy proceeding insofar as Petitioner is concerned in that Petitioner's actions during the Chapter XI proceeding will not carry over to secure a claim to the rents in the Bankruptcy proceeding. On the other hand, in reinstating

the Order of Bankruptcy Judge Marvin R. Wooten (App. to Pet. for Cert. pp. 2a-20a), they are ruling that, insofar as Respondents are concerned, a Chapter XI proceeding is a part of the Bankruptcy proceeding since that Order allowed priority to claims arising out of the Chapter XI proceeding. The order of Judge Wooten awarded without exception attorney fees and accountant's fees generated as a result of work done during the Chapter XI proceeding.

The nature of the relationship between Chapter XI and straight bankruptcy cannot fluctuate depending on whose rights are involved. The same interpretation of the relationship must be applied both to the above claimants and to the Petitioner.

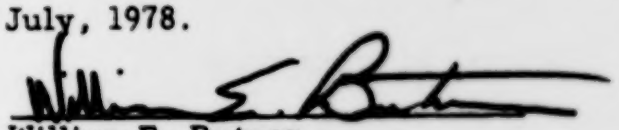
This contradiction in the opinion of the Fourth Circuit Court of Appeals is obvious and cannot be resolved. Thus the United States Supreme Court should, by virtue of its supervisory power over the lower Federal courts pursuant to Supreme Court rule 19(1)(b), re-

move this contradiction. 28 U.S.C. Appendix--Rule of the Supreme Court 19(1)(b) p. 7686.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Fourth Circuit Court of Appeals should be reversed and the cause be remanded to the Bankruptcy Court for implementation of the judgment of the United States District Court.

This the 19th day of July, 1978.



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This the 25th day of July, 1978.

William E. Butner

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No. 77-1410

In the Supreme Court of the United States

OCTOBER TERM, 1978

IN THE MATTER OF GOLDEN ENTERPRISES, INC., BANKRUPT, WILLIAM E. BUTNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the bankruptcy court (Pet. App. 2a-20a) and the district court (Pet. App. 21a-30a) are unreported. The opinion of the court of appeals (Pet. App. 31a-42a) is reported at 566 F. 2d 1207.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1977 (Pet. App. 31a), and a timely petition for rehearing filed on behalf of petitioner was denied on January 6, 1978 (Pet. App. 43a).

The petition for a writ of certiorari was filed on April 4, 1978, and was granted on June 12, 1978 (A. 803a-804a). The jurisdiction of this Court rests on 11 U.S.C. 47(c) and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the mortgagee of real property is entitled to rents accruing during the period from the initiation of liquidation proceedings to the foreclosure sale of such property, where the mortgage does not provide for an assignment of the rents, the mortgagee does not seek to have the rents sequestered for his benefit, and the mortgagee has no equitable basis for his claim.

STATUTES INVOLVED

The pertinent provisions of Sections 57, 60, 67 and 70 of the Bankruptcy Act (11 U.S.C. 93, 96, 107 and 110) are set forth in the Appendix, *infra*, 1a-13a.

STATEMENT

1. *The Attempted Arrangement.* On May 4, 1973, Golden Enterprises, Inc. filed a petition for an arrangement under Chapter XI of the Bankruptcy Act, Sections 301-399 (11 U.S.C. 701-799). Golden had been engaged in commercial real estate operations and retail sales of merchandise. Its real estate operations were located in the vicinity of Hickory, North Carolina (Pet. App. 2a; A. 60a-63a). During the arrangement proceedings, Golden's retail operations were liquidated; however, it attempted to

improve its financial condition by continuing its real estate operations (see A. 69a-94a).

Golden's real estate consisted of four tracts of commercial property, referred to in the proceedings below as Tracts I-IV.[1] The arrangement plan, *inter alia*, envisioned the completion of income-producing improvements on Tract IV.[2] Tract IV was subject to a first deed of trust in the original amount of $755,000, held by Shelby Savings and Loan Association (A. 155a). On February 14, 1974, after considering various alternative financing arrangements, Golden moved to consolidate the various liens upon all of its properties, excluding the first trusts, into a $360,000 second deed of trust, in favor of petitioner William E. Butner, Robert L. McKaughn and Jack Sipe Construction Company.[3] Golden sought this consolidation in order to complete the proposed construction on Tract IV (A. 159a-160a).

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[1] In addition to Tracts I-IV, Golden owned other real estate which was also subject to a first trust and to petitioner's deed of trust. See A. 445a-458a. By consent, Golden abandoned these properties to the holders of the first trust (A. 418a-420a), and they are accordingly not involved in this litigation.

[2] Tract IV is sometimes referred to as the Tate Boulevard property (A. 294a).

[3] Petitioner and McKaughn had a pre-petition second trust on the property to secure a $250,000 note (A. 78a). The arrangement originally contemplated that a bank would advance $110,000, assume Golden's obligation secured by the second trust and consolidate the debts owed to it by Golden. In return, the bank would receive a second trust on all of the property in the amount of $460,000 (A. 80a).

The plan contained no provision for a security interest in the rents inuring to the benefit of the prospective holders of the second trust in the event of default. On April 17, 1974, the bankruptcy judge approved the plan (A. 195a-196a). His order provided that "the holders of the note or any assignee thereof shall not attempt to file a petition to reclaim or to foreclose except upon motion to this Court setting forth the reasons therefor" (A. 196a).

On April 18, 1974, the bankruptcy judge, pursuant to Golden's motion, appointed an agent "to collect rents and to apply the proceeds under the supervision of the Court" (A. 204a). The order further instructed the agent to apply the income received to the following debts of the corporation (A. 205a-206a):

1. Federal and State Income Tax, if any,
2. Monthly mortgage payments to First National Bank of Catawba County, Fidelity Federal Savings and Loan Association, and Shelby Savings and Loan Association (two loans),[4]
3. Ad valorem property taxes,
4. Fire insurance premiums, and
5. Interest and principal on secondary mortgages.

See also Pet. App. 2a, 11a-12a.

On July 1, 1974, the amended real estate plan was implemented. In accordance with the plan, the deed

[4] These institutions held the first trusts on the four tracts.

of trust contained no provision for a security interest in rents or profits arising from the property in the event of Golden's default (A. 445a-465a).

2. *Bankruptcy of Golden.* Golden operated as a debtor-in-possession, but the plan for an arrangement was never confirmed. On December 5, 1974, Golden moved to extend the time for completion of the arrangement, and for an order to show cause why it should not be adjudicated a bankrupt (A. 266a-278a). On December 30, 1974, however, petitioner and McKaughn filed an application seeking, alternatively, dismissal of the Chapter XI proceedings, and conversion into a Chapter X proceeding, or a removal of the court's "stay of execution on the above-described deed of trust" (A. 405a-406a). After a hearing, Golden was ordered to file an indemnity bond of $50,000 on or before February 5, 1975. Golden failed to file the required bond; following a subsequent hearing, Golden was adjudicated a bankrupt on February 14, 1975 (A. 337a-338a).

The arrangement proceedings had occurred during an economic recession when there were numerous foreclosures and general depression of real estate values (Pet. App. 5a). The bankruptcy judge found that if Golden's real estate had been liquidated during this period (Pet. App. 6a):

> the property would not have generated enough at auction to satisfy the first lien holders in full. Thus, the diligent efforts of * * * [the creditors' committee, its attorneys, attorney for the Debtor and Jack Sipe Construction Co.] averted

> straight bankruptcy for the Debtor until the recession began to subside and, in so doing, substantially enhanced the value of the real estate and also increased the likelihood of the second lien holders and other creditors receiving equity from a sale of the real estate by generating rent from the improvements to reduce the balances of the first mortgages on the real estate.

The bankruptcy judge further found that under the arrangement payments totalling $545,000 had been made which inured to the benefit of the secured creditors (Pet. App. 5a).

On February 14, 1975, Joe N. Cagle was appointed trustee in bankruptcy. The trustee was ordered (A. 342a-343a):

> to collect and receive all rents * * * and to hold and retain all moneys thus received to the end that the same may be applied under this or different or further orders of this Court.

The trustee originally made payments to the holders of the first trusts. However, pursuant to the bankruptcy judge's order appointing the trustee, the judge directed the trustee not to make any payments on the trusts. The trustee was informed that the rental income would be needed to pay the costs of administration (A. 799a). The trustee notified the holders of both the first and second trusts of the bankruptcy judge's instruction (A. 796a-800a). Petitioner took no steps to appeal the bankruptcy judge's instruction or otherwise move to have the rents sequestered for his benefit, although the mortgage was in default (see Pet. App. 36a-37a).

After the conversion of Chapter XI arrangement to a liquidating bankruptcy, the first meeting of Golden's creditors was held on April 16, 1975. Golden's only asset was the real estate, which was subject to the following trusts and had been appraised at the following values:

Parcel [5]	Appraised Value [6]	Approximate First Mortgage Balance [7]	Indicated Equity
Tract I (referred to also as F. Avenue, S.E. and Metelpel or Mepel Building)	$ 110,000	$ 48,000	$ 62,000
Tract II (referred to also as Office Complex or Shopping Center)	250,000	174,000	76,000
Tract III (referred to also as Continental Supply Facility or 231 Ninth Street Lane, S.E. or Little Street)	360,000	225,000	135,000
Tract IV (referred to also as Tate Boulevard)	953,000	741,000	212,000
Totals	$1,673,000	$1,188,000	$485,000

[Footnotes 5, 6 and 7 on following page]

At the hearing, the trustee stated that Tracts I, II, and III were readily saleable for amounts approaching their appraised values (A. 380a-382a). However, because of the unavailability of financing and the depressed economic conditions in the locality, the trustee believed that the sale of Tract IV (Tate Boulevard) at its appraised value would be difficult (A. 379a). The trustee accordingly outlined (A. 384a-385a) three possible courses of action—(1) sale of the property, (2) abandonment of the property to the holders of the second trusts, and (3) acquiescence in foreclosure proceedings by any of the trust holders. Petitioner urged the second option—a conveyance of the property to the second trust holders. In response, the bankruptcy judge stated (A. 399a-400a):

> I'm not disposed to believe that it would be in the best interest of all the creditors to convey that property to the second mortgage holders * * *. I'll have to take a while to digest that suggestion, and one of the reasons is I'm not sure what the extent of the costs and expenses of administration are and how they should be borne by the creditors.

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[5] This tract breakdown of the real estate follows the description contained in the trustee's deed to petitioner and his wife. See A. 663a-672a.

[6] Mercer Simmons, whom the bankruptcy judge recognized as an expert, appraised the properties (A. 289a, 292a-294a).

[7] The first mortgage balance figures are set forth in the Statement of Assets filed by Golden on March 24, 1975, pursuant to Rule 122 of the Bankruptcy Rules (A. 357a-365a).

The bankruptcy judge and the trustee both believed that the properties would become more saleable in the immediate future because financing was becoming increasingly available and interest rates were declining (A. 402a). Because of these considerations, the bankruptcy judge expressed the opinion that "a little delay" might be helpful (A. 402a).

Accordingly, on June 11, 1975, the trustee filed a complaint in an adversary proceeding "To Sell Real Estate and Transfer Certain Liens to Proceeds of Sale." The complaint sought the sale of the real estate, subject only to the first trusts, and the transfer of the rights of other secured parties (*i.e.*, the second mortgagees) in exchange for the proceeds of sale (A. 421a-433a). Petitioner did not file an answer to the complaint.[8] After an adversary hearing was held on June 30, 1975 (A. 39a),[9] the bankruptcy judge ordered that the sale be held on July 28, 1975. At the ensuing sale, the highest bids on the four tracts were as follows (A. 563a-568a):

Tract I	$43,500
Tract II	28,000
Tract III	75,000
Tract IV	100

The holders of the second trust objected to the sale and requested that the properties be abandoned to

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[8] Answers were filed on behalf of Shelby Savings and Loan Association, Fidelity Savings and Loan Association, First National Bank of Catawba County, and Golden (A. 36a-39a).

[9] No transcript of this proceeding is available.

them.[10] On August 4, 1975, the bankruptcy judge denied this request. The judge confirmed the sales of Tracts I and III and transferred the rights of the holders of the second trusts in exchange for the proceeds of sale (A. 569a-571a). Thereafter, on August 19, 1975, the holders of the second trust moved to amend the judgment and for a rehearing on the confirmation order, again contending that the property should be abandoned to them (A. 612a-631a). In denying the motion, the bankruptcy judge pointed out that the second mortgagees had not appealed from his order of June 30, 1975, in which he ordered the property sold, that the sale had been properly held, and that the bidding on the sales of Tracts I and III was "spirited[ly] competitive * * * although, apparently, none of the second lienholders entered any bids" (A. 641a-644a).

The district court affirmed the bankruptcy judge's order insofar as it directed that the property be sold. However, it vacated the bankruptcy judge's order confirming the sale of Tracts I and III, and ordered a new sale of all four tracts, subject to the first trusts. The district court's order permitted the holders of the second trust "to use the outstanding principal balance of their Deed of Trust to bid" at the resale (A. 655a-657a). The district court further ordered that (A. 656a):

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[10] This objection and the request were apparently orally made.

> If the proceeds of said sale are insufficient in amount to pay the principal balance of $360,-000.00 outstanding on the second Deed of Trust or if the holders of the said second Deed of Trust are not the high bidders within the amount of said principal balance of said second Deed of Trust on all four tracts of land, then the Trustee shall forthwith abandon the said real estate.

The four tracts were resold on November 12, 1975. On that date, Jack Sipe Construction Company and McKaughn assigned their rights under the second deed of trust to petitioner and his wife (A. 674a-688a). Petitioner bid in all four tracts for $174,000 (Pet. App. 33a) and, on November 20, 1975, the trustee conveyed these properties to petitioner and his wife. The deed from the trustee specifically provided that (A. 672a-673a):

> The accrued rents and the right to collect unpaid accrued rents from the above-described tracts of real estate are hereby expressly not conveyed, but are reserved to the Grantor [the trustee].

Petitioner accepted the deed from the trustee (Pet. App. 32a-33a).

In the meantime, from February 14, 1975 (date of the adjudication of bankruptcy), to November 20, 1975 (date of the conveyance of the properties), the trustee collected $157,348.80 in rents from the four tracts, and paid approximately $2,973.26 of expenses directly relating to the properties (A. 349a, 368a,

409a, 414a, 434a, 466a, 607a, 645a, 649a, 695a).[11] The fund derived from these rents is the subject of this litigation.

3. *The Present Controversy Over Accrued Rents.* On July 1, 1975, petitioner filed a proof of claim in bankruptcy as a secured creditor in which he stated "[t]hat claimant does not hold * * * any security for the debt * * * for the claimant's use except *Note and Deed of Trust dated July 1, 1974* * * *" (emphasis in original) (A. 443a). At the time petitioner presented his claim, the trustee had collected and held over $82,000 in rents (A. 436a).[12] Notwithstanding his earlier failure to claim any security interest other than his note, on December 1, 1975, petitioner filed a Motion for Distribution of Funds in which he claimed that "as secured creditor and valid holder of all right, title and interest to the second mortgages * * *, [he] is entitled to a substantial portion of those accumulated rents and profits * * * held by the [trustee]" (A. 692a). The trustee objected to the claim (A. 733a-736a). At this time, the balance of the cash on hand held by the trustee was $162,-971.32 (Pet. App. 32a), which would have been almost exhausted by petitioner's claim.

The bankruptcy judge rejected petitioner's claim to the accrued rents (Pet. App. 20a). He noted that

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[11] The expense figures are taken from the total monthly cash disbursements, less items that do not appear to be directly related to the management of the real estate.

[12] Previously, on July 12, 1973, and February 4, 1974, the United States had filed proofs of claims for taxes as a priority creditor (A. 95a-99a, 197a-201a).

the original basis for petitioner's claim was the second deed of trust in the amount of $360,000, that petitioner had bid in the property for the amount of $174,000, and that "none of the funds in the hands of the Trustee were derived from the sale of the collateral." The bankruptcy judge therefore disallowed the $186,000 difference between the original amount of the second trust ($360,000) and the bid-in price ($174,000) as a secured claim (Pet. App. 16a-17a). However, the bankruptcy judge allowed the $186,000 difference to be treated as a general unsecured claim (Pet. App. 17a). The court also allowed the claims for fees and expenses of the trustee and of the attorneys for the creditors' committee and the debtor (Golden) and ordered that these expenses be paid from the fund in the hands of the trustee (Pet. App. 17a-18a).

Petitioner sought review of the bankruptcy judge's order in the district court. After a hearing, the trustee and the attorney for the creditors' committee filed an uncontradicted affidavit in which they stated that petitioner's "out of pocket" investment in the second mortgage was $272,200 rather than the face amount of the mortgage, $360,000 (A. 780a). They further pointed out that shortly after his purchase of the property, petitioner had refinanced Tracts I-III as shown below (A. 778a-779a):

	Refinanced Amounts	First Trust or Mortgage	Costs of Refinancing	Excess Cash Received over First Trust or Mortgage after Costs
Tract I (Metelpel Building)	$ 85,000.00	$ 48,520.51	$ —	$36,479.49
Tract II (Shopping Center)	212,000.00	191,965.76	975.00	28,034.24
Tract III (Continental Systems)	290,000.00	223,532.50	5,000.00	66,467.50

The affidavit also stated that on April 7, 1976, petitioner had sold a portion of Tract IV for $1,000,000, and that, after payments of the first mortgage, accrued taxes and expenses, he received a net amount of $162,049.06 (A. 777a). In addition, he retained a five-acre portion of Tract IV, which had been appraised at $50,000 (A. 779a). The affidavit concluded that, assuming the value of the property to be equal to the refinanced amounts, the value of the property petitioner received in the sale to him was substantially greater than the $174,000 bid price. Thus, petitioner apparently realized a profit on the properties received from the trustee (A. 781a). The facts alleged in the trustee's affidavit were not contested.

The district court reversed the order of the bankruptcy judge and held that petitioner's "secured status extend[ed] to the rents and profits derived from the property during the administration of the bankrupt's estate" (Pet. App. 29a). The court found that petitioner had done "all that he could do to obtain

possession of the property and proceed to foreclosure as well as to have the rents collected and sequestered" (Pet. App. 28a). The court further found that equity required that all the "rents * * * should go to * * * [petitioner] rather than to the unsecured creditors" (Pet. App. 28a). The court therefore remanded the case to the bankruptcy judge to determine what portion of the claimed expenses were reasonably incurred in the preservation of these properties (Pet. App. 29a).

The court of appeals, with one judge dissenting, reversed and remanded the case for reinstatement of the bankruptcy judge's order (Pet. App. 32a).[13] The court found that petitioner had not taken the necessary action to insure that the rents would be collected and sequestered for his benefit (Pet. App. 37a). It therefore held that petitioner was not en-

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[13] The appeal from the district court's order was taken by the trustee, the creditors' committee, the debtor and the United States. The interest of the United States derives from the trustee's interest. The claim of the United States (A. 471a) for unpaid employment taxes is for approximately $50,000 and has a priority under Section 64a(4) of the Bankruptcy Act (11 U.S.C. 104(a)(4)). The sole asset from which the United States can obtain satisfaction of its claim is the fund in the hands of the trustee derived from the rents obtained after the adjudication of bankruptcy. If, as the district court held, petitioner's security extended to these rents, the government's claim, as well as those for administration expenses, will not be satisfied. On the other hand, if, as the bankruptcy court and the court of appeals held, petitioner had no security interest in the rents, funds will be available, after payment of administration expenses, to satisfy the government's tax claim at least in part.

titled to the rents that accrued during the bankruptcy proceeding under the terms of the mortgage. In so holding, the court noted that while petitioner had made several informal requests to the bankruptcy judge that the property be abandoned to him, he pursued the matter no further when the judge refused to grant these requests. Indeed, when petitioner made one of these requests for abandonment at a time when the trustee had collected approximately $50,000 in rents, he specifically waived any claim to the accrued rents. Moreover, when the trustee formally sought authority to sell the property, petitioner was made an adversary party to the request. However, he failed to file an answer, although he could have requested either abandonment, permission to foreclose under state law, or a determination of the priority of his lien on the rents (Pet. App. 37a). The court of appeals concluded, "[i]n short, we can find no sufficient indicia that [petitioner] would have proceeded to assert a security interest in the rents had bankruptcy not ensued" (*ibid.*).

The court of appeals also rejected the district court's application of "equitable principles" in determining the entitlement to the rents (Pet. App. 35a). The court stated that even "[i]f equity has a part in the resolution of a question of this type—an issue upon which we express no view—equity does not supply the answer here" (Pet. App. 38a).

SUMMARY OF ARGUMENT

1. While the Bankruptcy Act contains detailed provisions governing the priority and payment of unsecured claims, it provides no comparable rules with respect to distributions to secured creditors. Once a debtor is adjudicated a bankrupt and a trustee is appointed, any liens that are valid against the debtor at that time are also valid against the trustee unless they can be set aside under other provisions of the Act. Thus, for the purposes of the Bankruptcy Act, the trustee steps into the shoes of the debtor and is subject to the claims of secured creditors to which the debtor would otherwise have been subject had bankruptcy not occurred.

The question as to what constitutes a valid security is not a matter of federal bankruptcy law; rather it turns on the commercial law of the particular state. The correctness of this proposition is confirmed not only implicitly by the structure of the Bankruptcy Act but also explicitly by an unbroken line of decisions of this Court which hold that the nature and extent of a creditor's security interest in a bankruptcy proceeding is determined by reference to state law. See, *e.g.*, *Hiscock* v. *Varick Bank of New York*, 206 U.S. 28 (1907); *Stellwagen* v. *Clum*, 245 U.S. 605, 613 (1918).

Once it is recognized that the fact of bankruptcy does not alter the nature and extent of secured claims against the debtor, the correctness of the decision of the court of appeals becomes readily apparent. The court held that petitioner, a second mortgagee of

real property, was not entitled to rents accruing during the period from the initiation of liquidation proceedings to the foreclosure sale of such property. Since the Bankruptcy Act does not provide substantive rules with respect to the priority accorded secured creditors, the fact of the mortgagor's bankruptcy is analytically irrelevant in determining whether petitioner would be entitled under state law to the rents produced by the property during bankruptcy. Therefore, the proper question to be determined under state law is whether a mortgagee such as petitioner is entitled to accrued rents upon the default of the mortgagor.

Here, the relevant state law (North Carolina) provides that a mortgagee is not entitled to the rents until he either takes possession of the property or has a receiver appointed to collect the rents for his benefit. Petitioner did neither; indeed, he took no affirmative action that fairly could be regarded as asserting a claim to the rents until after he purchased the property at the foreclosure sale. In these circumstances, petitioner would not have been entitled under state law to the rents if bankruptcy had not occurred, and the bankruptcy of the mortgagor did not create any additional rights in favor of petitioner's security in the property.

2. In holding that petitioner was not entitled to the rents because he did not have a security interest in them under North Carolina law, the decision below is in accord with four other courts of appeals (the Second, Sixth, Eighth and Ninth Circuits) which have

ruled that state law governs a mortgagee's right to rents earned during bankruptcy. *In re Brose*, 254 F. 664 (2d Cir. 1918); *Tower Grove Bank & Trust Co.* v. *Weinstein*, 119 F.2d 120 (8th Cir. 1941); *In re Hotel St. James Co.*, 65 F.2d 82 (9th Cir. 1933). See also *In re American Fuel & Power Co.*, 151 F.2d 470, 481 (6th Cir. 1945). Those decisions are consistent with the established policy of the Bankruptcy Act that state law determines the validity of the interests of secured creditors. By applying state law in determining a mortgagee's right to rents, these authorities insure that the outcome will be the same whether the mortgagee's claim is raised in a federal bankruptcy proceeding, a state court receivership, or an action for foreclosure. Such uniformity of result discourages forum shopping and prevents "a windfall merely by reason of the happenstance of bankruptcy." *Lewis* v. *Manufacturers Nat. Bank*, 364 U.S. 603, 609 (1961).

Moreover, the procedure applicable to the claims of a secured creditor under the Bankruptcy Act is in all significant respects parallel to his rights and remedies under North Carolina law. If bankruptcy had not intervened and the amount bid in by petitioner at the foreclosure sale did not fully satisfy the amount due on his debt, petitioner would have been entitled to pursue the debtor for a deficiency judgment for the balance of the debt. But this deficiency judgment would not be entitled to any priority over other general unsecured claims until docketed. Until then it would be a claim against the debtor's

other property in the same manner as any other general unsecured claims and would share in that property on a pro rata basis.

Here, Section 57h of the Bankruptcy Act (11 U.S.C. 93(h)) requires a similar result. Pursuant to that provision, the bankruptcy court determined the value of the security held by petitioner "by converting the same into money according to the terms of the agreement," *i.e.*, it sold the property at a foreclosure sale. It thereafter credited "the amount of such value * * * upon [petitioner's claim]" and allowed the difference as an unsecured claim against the bankrupt estate. In short, Section 57h, like state law, contemplates a sale of the security as described in the instrument upon which the creditor bases his claim. Since petitioner took no steps to obtain the incidents of ownership (*i.e.*, the rents) prior to the foreclosure sale, his security interest is necessarily limited to the value obtained at the sale.

Finally, the requirement that the mortgagee take affirmative action, consistent with state law, to secure an interest in the rents furthers a more orderly and certain administration of the bankruptcy estate. Such a requirement provides both the bankruptcy court and the parties with early notice of the nature and extent of the mortgagee's claim and enables the court to take that claim into account prior to any sale of the property.

3. The minority line of decisions (of the Third and Seventh Circuits) rejecting the application of

state law in favor of "equitable considerations" are based upon the erroneous premise that bankruptcy destroys the mortgagee's remedies under state law without providing an equivalent remedy in bankruptcy. *Bindseil* v. *Liberty Trust Co.*, 248 F. 112 (3d Cir. 1917); *In re Pittsburgh-Duquesne Development Co.*, 482 F.2d 243 (3d Cir. 1973); *In re Wakey*, 50 F.2d 869 (7th Cir. 1931). But the mortgagee's remedies in the bankruptcy court are similar to those that would have been available to him in a state court. For example, while the mortgagee can gain possession of the property by consent or judicial action under state law, the trustee can accomplish the same result in bankruptcy by abandoning the property to the mortgagee. If the trustee refuses, the mortgagee can litigate the question and can seek the appointment of a trustee to sequester the rents for his benefit. Thus, contrary to the assumption of the minority view, bankruptcy does not cut off the mortgagee's remedies so as to require an "equitable" adjustment of the rights of the parties.

4. a. Even on the assumption that the court of appeals correctly concluded that the question of the mortgagee's entitlement to rents was governed by state law, petitioner errs in contending that he took sufficient action during the bankruptcy proceeding to gain a security interest in the rents under North Carolina law. Petitioner relies upon an order of the bankruptcy court appointing an agent to collect the rents during the Chapter XI arrangement that preceded the bankruptcy. But this agent was not ap-

pointed to collect the rents solely for petitioner's benefit. The record undisputably shows that the appointment of the agent was nothing more than an administrative device employed by the court to facilitate collection of the rents for the benefit of all of the creditors.

b. Finally, petitioner would not be entitled to the rents even under the minority line of decisions which rejects the application of state law in favor of equitable principles. Under the minority view, the mortgagee is not entitled to the rents unless he establishes that "the mortgaged property was worth less than the mortgaged indebtedness." *In re Cigar Stores Realty Holdings*, 69 F.2d 823, 824 (2d Cir. 1934). Here, petitioner has not established the existence of a deficiency between his debt and the value of the property. Indeed, the record establishes that the value of his security over his investment was approximately $70,000. In these circumstances, the court of appeals correctly concluded (Pet. App. 38a) that even "[i]f equity has a part in the resolution of a question of this type * * * equity does not supply the answer here."

ARGUMENT

PETITIONER IS NOT ENTITLED TO THE RENTS PRODUCED BY GOLDEN'S REAL PROPERTY DURING THE PERIOD FROM THE INITIATION OF LIQUIDATION PROCEEDINGS TO THE FORECLOSURE SALE OF THE PROPERTY

The question presented in this bankruptcy case is whether petitioner, a second mortgagee of real property, was entitled to the rents produced by the property during the period from the initiation of liquidation proceedings to the foreclosure sale of such property. As the court of appeals properly observed (Pet. App. 34a-35a), the question of a secured creditor's right to income, generated by the secured property during bankruptcy, has produced a conflict in the circuits. In accord with the decision below, the Second, Sixth, Eighth and Ninth Circuit have held that the mortgagee has no right to the rents once the bankruptcy court assumes control of the property, unless he petitions the bankruptcy judge for a sequestration order, obtains the appointment of a receiver to collect the rents, or secures the bankruptcy judge's consent to foreclosure. *In re Brose*, 254 F. 664 (2d Cir. 1918); *Tower Grove Bank & Trust Co.* v. *Weinstein*, 119 F.2d 120 (8th Cir. 1941); *In re Hotel St. James Co.*, 65 F.2d 82 (9th Cir. 1933). Accord: *In re American Fuel & Power Co.*, 151 F.2d 470, 481 (6th Cir. 1945). See also *Fidelity Bankers Life Insurance Co.* v. *Williams*, 506 F.2d 1242, 1243 (4th Cir. 1974). Under this approach, the primary focus in determining the entitlement of a mortgagee to rents is the

nature of his interest in state law, the terms of the mortgage and the acts of the parties. The rationale for this majority view is that the rights and duties of the parties are not altered by bankruptcy. However, the bankruptcy court supersedes the state court as the proper forum for protecting the interests of creditors and determining whether the mortgagee has a security interest in the rents under state law.

The contrary line of authority is the minority view of the Third and Seventh Circuits. See *Bindseil* v. *Liberty Trust Co.*, 248 F. 112 (3d Cir. 1917); *In re Pittsburgh-Duquesne Development Co.*, 482 F.2d 243 (3d Cir. 1973); *In re Wakey*, 50 F.2d 869 (7th Cir. 1931). Those courts have held that the mortgagee may recover the rents if he can establish an equitable basis for his claim. The rationale for these decisions is that the rights of both the secured and unsecured creditors are fixed at the adjudication of bankruptcy and the bankruptcy divests the mortgagor's possession of the realty. Under this minority view, the rents arising thereafter belong to the mortgagee and should not be diverted to the general creditors. The Third and Seventh Circuits regard the rents as belonging to the mortgagee as a matter of equity "to vindicate its own right of property." *In re Pittsburgh-Duquesne Development Co., supra*, 482 F.2d at 246. However, the mortgagee cannot recover the rents arising during bankruptcy unless he establishes that "the mortgaged property was worth less than the mortgaged indebtedness." *In re Cigar Stores Realty Holdings*, 69 F.2d 823, 824 (2d Cir. 1934).

We submit that the majority view of five circuits (the Second, Sixth, Eighth and Ninth Circuits, as followed by the court below) is more compatible with the purposes of the Bankruptcy Act and should be established by this Court as the uniform rule. When a liquidating bankruptcy occurs, the trustee takes title to the interests in property of the bankrupt. While the Bankruptcy Act accords priority to certain unsecured creditors (*e.g.*, administration expense creditors) over general unsecured creditors, it generally does not alter the rights of secured creditors as those rights are determined under state law. Here, if bankruptcy had not occurred, petitioner, as a second mortgagee of the bankrupt's real property, would not have been entitled under state law to the rents produced by the property, unless he had obtained possession of the property, or, upon foreclosure, obtained the appointment of a receiver to sequester the rents for his benefit. Petitioner did not take any of these necessary steps and the bankruptcy of the mortgagor did not create any additional rights in favor of petitioner's security interest in the property. Hence, he is not entitled to the rents accruing during bankruptcy. However, before describing the extent of petitioner's rights under state law, we first set forth for the Court the treatment of creditors in a liquidating bankruptcy.

A. The Rights Of Secured Creditors In A Liquidating Bankruptcy Are Determined Under State Law

The primary purpose of a liquidating bankruptcy is to provide for the orderly and equitable distribu-

tion of the bankrupt's assets to his creditors. *Bruning* v. *United States*, 376 U.S. 358 (1964); *Williams* v. *U. S. Fidelity Co.*, 236 U.S. 549, 554-555 (1915); *Sampsell* v. *Imperial Paper Corp.*, 313 U.S. 215, 219 (1941); 3 *Collier on Bankruptcy* § 60.01, at 743 (14th ed.). The legal representative of the bankrupt's creditors is the trustee, who is appointed to collect and distribute the assets of the bankrupt. See Sections 44 and 45 of the Bankruptcy Act (11 U.S.C. 72 and 73). Pursuant to Section 70a of the Act (11 U.S.C. 110(a), App., *infra*, 9a-12a), the trustee is vested by operation of law as of the date of the filing of the bankruptcy petition with the title of the bankrupt to all of his nonexempt property. The trustee's title carries with it the right to possession only for purposes of administration and distribution of the estate among the bankrupt's creditors. 4A *Collier*, *supra*, § 70.04, at 49-51. However, Section 70a "does not vest the trustee with any better right or title to the bankrupt's property than belong to the bankrupt or his creditors at the time when the trustee's title accrues." *Hewit* v. *Berlin Machine Works*, 194 U.S. 296, 302 (1904).

The general theory underlying the Bankruptcy Act is equality of distribution among the bankrupt's general unsecured creditors whose claims are proved and allowed. See Sections 57 and 63 of the Act (11 U.S.C. 93 and 103). Thus, the liquidation provisions of the Act (Sections 1-72, 11 U.S.C. 1-112) seek the distribution of the bankrupt's unencumbered assets (except exempt property) among his general unsecured creditors, with certain of those creditors given a priority.[14] The Act establishes the "date of bankruptcy," *i.e.*, the date when the petition in bankruptcy is filed, as the time for determining which of the bankrupt's assets are unencumbered and who are the general creditors. However, because it would be relatively easy for the creditors to encumber or attach the debtor's assets in anticipation of the debtor's filing a petition in bankruptcy and thereby defeat the claims of the general unsecured creditors in the ensuing liquidation proceeding, the Act provides for the invalidation of certain pre-bankruptcy transfers even though such transfers might be otherwise valid under state law. See generally 3 *Collier*, *supra*, § 60.01, at 743-744.

First, Section 70c (11 U.S.C. 110(c), App., *infra*, 12a-13a) gives the trustee the power to strike down secret liens and transfers. See *United States* v. *Speers*, 382 U.S. 266, 275 (1965); 4B *Collier*, *supra*, §§ 70.46, 70.48, at 559, 585-586. Second, Section 60a and b (11 U.S.C. 96(a) and (b)) give the trustee the power to void, as preferences, certain transfers made by the bankrupt within four months of bankruptcy. Third, Section 67a and d (11 U.S.C.

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[14] Section 64a of the Act (11 U.S.C. 104(a)) prescribes the order of priority for the payment of the claims of the general unsecured creditors. It accords a first priority to the costs and expenses of administration of bankruptcy and a fourth priority to "taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof which are not released by a discharge in bankruptcy * * *." See generally 3A *Collier*, *supra*, § 64.02[1], at 2063-2065.

107(a) and (d)) invalidate certain liens against a bankrupt's property obtained through a judicial proceeding within four months of bankruptcy and certain fraudulent transfers made within one year of bankruptcy. Finally, Section 70e (11 U.S.C. 110(e)) invalidates any transfer deemed fraudulent under federal or state law. See generally 3 *Collier*, *supra*, § 60.01, at 744-746.

While the Bankruptcy Act contains detailed provisions governing the priority and payment of unsecured claims (see Section 64a, 11 U.S.C. 104(a)), it provides no comparable rules with respect to distributions to secured creditors. The Act addresses the status of secured creditors only in the context of according the trustee the power to set aside certain secured transfers that are inequitable to the unsecured general creditors. See Sections 60, 67, and 70 of the Act; cf. 4 *Collier*, *supra*, § 67.02[1], at 19-43.[15] Thus, Section 1(28) of the Act (11 U.S.C. 1(28)) defines a "secured creditor" in general terms to include "a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this title * * *." But the question of what constitutes a valid security, or the extent of such security, is not a matter of federal bankruptcy law;

[15] There is an exception for statutory liens in favor of employees, contractors, mechanics, or any other class of persons, and statutory liens for taxes and debts owed to the United States or to any state created under federal or state law. Such liens may be valid against the trustee even though they may arise or be perfected within four months of bankruptcy. See Section 67b of the Act, 11 U.S.C. 107(b).

rather, it turns on the commercial law of the particular state.

The correctness of this proposition is confirmed not only implicitly by the structure of the Bankruptcy Act but also explicitly by an unbroken line of decisions of this Court, which hold that the nature and extent of a creditor's security interest in a bankruptcy proceeding is determined by reference to state law. In *Hiscock* v. *Varick Bank of New York*, 206 U.S. 28 (1907), the Court upheld the validity of a lien upon assets held by a bankrupt and rejected the trustee's claim that the Bankruptcy Act deprived the lienor of any remedy otherwise provided by state law. As the Court stated, "[t]he contracts of pledge were made, executed and to be performed in the State of New York, and the rights of the parties were governed by the law of that State. No preference under the Bankruptcy Act was alleged or proved, nor was there any allegation or proof that the pledge of the securities was in fraud of the rights of the creditors or trustee. The questions of the extent and validity of the pledge were local questions, and the decisions of the courts of New York are to be followed by this court" (*id.* at 37-38). As the Court subsequently explained in *Stellwagen* v. *Clum*, 245 U.S. 605, 613 (1918) (emphasis supplied):

> The Federal Constitution, Article I, § 8, gives Congress the power to establish uniform laws on the subject of bankruptcy throughout the United States. In view of this grant of authority to the Congress it has been settled from an early date that state laws to the extent that they conflict

with the laws of Congress, enacted under its constitutional authority, on the subject of bankruptcies are suspended. While this is true, state laws are thus suspended only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress. *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Ogden* v. *Saunders*, 12 Wheat. 213.

Notwithstanding this requirement as to uniformity the bankruptcy acts of Congress may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States. For example, *the Bankruptcy Act recognizes and enforces the laws of the States affecting dower, exemptions, the validity of mortgages, priorities of payment and the like.* Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, although in these particulars the operation of the act is not alike in all the States. *Hanover National Bank* v. *Moyses*, 186 U.S. 181, 188, 189, 190.

Accord: *Thompson* v. *Fairbanks*, 196 U.S. 516, 522 (1905); *Humphrey* v. *Tatman*, 198 U.S. 91, 93-95 (1905); *York Manufacturing Co.* v. *Cassell*, 201 U.S. 344, 352 (1906); *Thompson* v. *Magnolia Co.*, 309 U.S. 478, 483-484 (1940); *Lewis* v. *Manufacturers Nat. Bank*, 364 U.S. 603, 607-609 (1961). See also *Louisville Bank* v. *Radford*, 295 U.S. 555, 590 (1935).

Accordingly, a determination of petitioner's rights to the rents accruing during bankruptcy requires an investigation of the state law governing his mortgage. We turn, therefore, to the law of North Carolina.

B. Under North Carolina Law, Petitioner Would Not Be Entitled To The Rents Upon The Default Of Golden Upon The Mortgage Unless He Took Possession Of The Property Or Obtained The Appointment Of A Receiver To Sequester The Rents Prior To A Foreclosure Sale

1. The mortgage in this case took the form of a deed of trust (A. 445a). Under North Carolina law, the trustee under a deed of trust has bare legal title to the property solely for the purpose of securing the mortgagor's obligation to the mortgagee.[16] *Walston* v. *Twiford*, 248 N.C. 691, 10 S.E.2d 62 (1958); *Gregg* v. *Williamson*, 246 N.C. 356, 358, 359, 98 S.E.2d 481, 484 (1957). This is the applicable rule in most states. See *Osborne on Mortgages* § 17, at 26 (1970). Thus, subject to petitioner's rights to the security in the property under the deed, Golden "is 'considered as the owner of the land'" (*Gregg* v. *Williamson*, *supra*, 246 N.C. at 360, 98 S.E.2d at 485), and petitioner was not entitled to possession of

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[16] Under North Carolina law, and in general, the major difference between a mortgagee with a power of sale and a deed of trust is that a deed of trust vests bare legal title in an independent trustee who has the power of sale exercisable upon default and at the request of the mortgagee. See *Oil Co.* v. *Baars*, 224 N.C. 612, 615, 31 S.E.2d 854 (1944). Although the creditor and debtor are technically in a cestui que trust relationship, they are nevertheless generally referred to as mortgagee and mortgagor. See *Mills* v. *Building & Loan Association*, 216 N.C. 664, 6 S.E.2d 549 (1940); *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank & Trust Co.*, 300 U.S. 124 (1937) (discussing North Carolina law, as applied to a deed of trust); *Osborne*, *supra*, § 17, at 26. Thus, the differences between a mortgagee with a power of sale and a deed of trust are not material in this case.

the property until default of the mortgage contract occurred (*Brannock* v. *Fletcher*, 271 N.C. 65, 155 S.E. 2d 532 (1967); *Gregg* v. *Williamson*, *supra*, 246 N.C. at 359, 98 S.E.2d at 484).[17] See also *Kistler* v. *Development Co.*, 205 N.C. 755, 172 S.E. 413 (1934); *Killebrew* v. *Hines*, 104 N.C. 182, 10 S.E. 159 (1889). Once a default occurred, petitioner became entitled under North Carolina law to possession of the property, which he could accomplish either by obtaining the consent of Golden or by an action in ejectment. *Brannock* v. *Fletcher*, *supra*. See, generally, 4 *American Law of Property* § 16.80, at 150 (1952). However, even though petitioner could obtain possession of the property prior to foreclosure, Golden's

[17] There are three different theories of mortgage law: title, intermediate, and the lien theory. In title states, the mortgagee has the right to possession even prior to default, subject to the mortgagor's rights to defeat the mortgagee's interest upon the discharge of his obligation. However, if the mortgagee takes possession, he is under a strict duty to account for rents and profits during this period of possession. See page 34, *infra*. In intermediate states, the mortgagee has no right to possession until the mortgagor defaults. Finally, in a lien jurisdiction, the mortgagee's interest is a security interest and the mortgagor is entitled to retain possession after default and until foreclosure. See *Osborne*, *supra*, §§ 14-15, at 32-34. While North Carolina is sometimes classified as a title state (see Comment, *The Mortgagee's Right to Rents After Default*, 50 Yale L. J. 1424, 1425, n.6 (1941)), its case law suggests that it is an intermediate state. These theoretical differences among the states do not appear to warrant significantly different results in the rights of the parties, nor are they relevant for purposes of the question presented in this case. See Berick, *The Mortgagee's Rights to Rents*, 8 U. Cinn. L. Rev. 250 (1934).

interest or "equity of redemption" could only be terminated by a foreclosure sale.[18] See, generally, *Osborne*, *supra*, § 339, at 727; § 337, at 724.

While petitioner was entitled to seek possession of the mortgaged property after Golden's default and prior to foreclosure, as long as Golden remained in possession—even after its default—it, and not petitioner, was entitled to the rents and profits generated by the property. *Gregg* v. *Williamson*, *supra*, 246 N.C. at 360, 98 S.E.2d at 485; *Kistler* v. *Development Co.*, *supra*. This aspect of North Carolina law is in

[18] See §§ 45-21.1 *et seq.* and §§ 1-339.1 *et seq.*, N.C. Gen. Stat. (1976 Repl.).

If the proceeds from a foreclosure sale do not satisfy the mortgage indebtedness, the mortgagee is generally entitled to institute an in personam action against the mortgagor and obtain a deficiency judgment for the difference. See *Osborne*, *supra*, § 333, at 975. The deficiency judgment becomes a lien on other real estate owned by the debtor only at the time it is docketed (see § 43-45, N.C. Gen. Stat. (1976 Repl.), and may be enforced by execution and sale (§ 1-309, N.C. Gen. Stat. (1976 Repl.).

Under North Carolina law, there are two limitations on the mortgagee's ability to obtain such relief. First, if the mortgagee is the purchaser pursuant to a sale under power in the deed, the mortgagor can defeat the deficiency claim, in whole or in part, by showing that "the property sold was fairly worth the amount of the debt secured by it at the time * * * or that the amount bid was substantially less than its true value." § 45-21.36, N.C. Gen. Stat. See *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank & Trust Co.*, *supra*. The law of North Carolina also bars a deficiency judgment if the trust instrument reflects that the trust was created "to secure to the seller [of the property] the payment of the balance of the purchase price of real property." § 45-21.38, N.C. Gen. Stat.

accord with the general rule that the rents and profits are incidents of possession. See *Freedman's Saving Co.* v. *Shepherd*, 127 U.S. 494 (1888); II *Glenn on Mortgages* §§ 170, 180, at 908, 939 (1943); 2 *Wiltsie on Mortgage Foreclosure* § 560, at 908 (1939). Moreover, petitioner had "no right to possession except to assure payment of the debt or performance of other conditions of the mortgage." *Gregg* v. *Williamson*, *supra*, 246 N.C. at 359, 98 S.E.2d at 484. See also *Kistler* v. *Development Co.*, *supra*. Thus, if petitioner had taken possession, he would be chargeable to the trustee for an accounting of the rents and profits arising after his assumption of possession, and would have had a further duty to apply the rents and profits to the debt and to account to the trustee for any surplus. See *Brannock* v. *Fletcher*, *supra*; *Anderson* v. *Moore*, 233 N.C. 299, 63 S.E.2d 641 (1951). See generally, *Osborne*, *supra*, § 167, at 288.

In addition to taking possession, the mortgagee has another remedy under North Carolina law if the mortgagor is insolvent and the security is inadequate to satisfy the debt. In these circumstances, the mortgagee, after instituting foreclosure, could seek the appointment of a receiver to collect the rents. The receiver would then take possession of the property under the supervision of the court and would likewise be accountable to both the mortgagee and the mortgagor. See *Kistler* v. *Development Co.*, *supra*; *Parker Co.* v. *Bank*, 204 N.C. 432, 168 S.E.2d 681 (1933). See generally, 2 *Wiltsie*, *supra*, §§ 561-562,

at 912-913, 917-918; Berick, *supra*, 8 U. Cinn. L. Rev. at 279.

2. Applying the foregoing rules of North Carolina law to the facts of this case, it is clear that petitioner was not entitled to the accrued rents. Since the Bankruptcy Act does not provide substantive rules with respect to the priority accorded secured creditors, the fact of Golden's bankruptcy is analytically irrelevant in determining whether petitioner would be entitled under state law to the rents produced by the property during bankruptcy. Therefore, the proper question to be determined under state law is whether a mortgagee such as petitioner is entitled to accrued rents upon the default of the mortgagor.

Once Golden defaulted on the mortgage, petitioner either could have sought a judicial sale of the property or a sale by the independent trustee under the deed of trust to recover the debt owed to him. However, North Carolina law provides that a mortgagee must take possession of the mortgaged property or have a receiver appointed to sequester the rents for his benefit in order to gain a security interest in the rents. To be sure, the ensuing bankruptcy prevented petitioner from taking actual possession of the property. But petitioner took no steps in the bankruptcy proceeding that could be deemed equivalent under North Carolina law to taking possession of the property. He neither sought the appointment of a receiver to sequester the rents for his benefit nor claimed that the rents belonged to him. Quite the contrary, in seeking the abandonment of the property

to him at a time when the accrued rents were approximately $50,000, petitioner specifically stated that he would waive any claim to the accrued rents (see Pet. App. 37a). Since petitioner did nothing that would have accorded him a security interest in the rents under North Carolina law had there been no bankruptcy, his claim deserves no different treatment in this federal bankruptcy proceeding. In either forum, petitioner has no security interest in the rents in derogation of Golden's general unsecured creditors.

C. The Majority Line Of Decisions Holding That State Law Governs A Mortgagee's Right To Rents During Bankruptcy Is In Accord With The Established Policy Of The Bankruptcy Act That State Law Determines The Validity Of The Interests Of Secured Creditors

As we have pointed out (*supra*, pages 25-27), once a debtor is adjudicated a bankrupt and a trustee is appointed, the trustee acquires title to all of the bankrupt's property. However, the trustee acquires only "the title of the bankrupt as of the date of the filing of the petition initiating [the bankruptcy] proceeding" (Section 70a of the Act, 11 U.S.C. 110(a)) so that any liens that are valid against the debtor at that time are also generally valid against the trustee. Thus, for purposes of the Bankruptcy Act, the trustee steps into the shoes of the debtor and generally is subject to the claims of secured creditors to which the debtor would otherwise have been subject had no bankruptcy occurred.

1. Once it is recognized that the fact of bankruptcy does not alter the nature and extent of secured claims against the debtor, the soundness of the majority view of the Second, Eighth and Ninth circuits, adopted by the court below, that state law governs a mortgagee's right to rents during bankruptcy becomes apparent. *In re Brose, supra; Tower Grove Bank & Trust Co.* v. *Weinstein, supra; In re Hotel St. James Co., supra.*[19] See also *In re American Fuel & Power Co., supra,* 151 F.2d at 481. Since the Bankruptcy Act does not provide substantive rules for determining the validity of liens against the debtor, there is no overriding policy that would support the establishment of a federal rule with respect to the mortgagee's right to rents during bankruptcy. Like the law of real property generally, the law with respect to the rights and remedies of parties to a mortgage is rooted in the state where the property is located and should not vary according to whether enforcement of the mortgage is sought in a federal or state court. Indeed, the application of state law by the federal courts is an inherent characteristic of our federal system. Cf. *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938). By applying state law in determin-

[19] See also *Petition of Cox,* 15 F.2d 764 (1st Cir. 1926), and *Merchants' and Mechanics' Bank* v. *Sewell,* 61 F.2d 814 (5th Cir. 1932), both of which held that the mortgagee was entitled to rents during bankruptcy because he had a security interest in them under state law. However, both decisions cited *Bindseil* v. *Liberty Trust Co.,* 248 F. 112 (3d Cir. 1917), which held that the mortgagee was entitled to the rents without regard to whether he had a security interest under state law (see pages 43-44, *infra*).

ing a mortgagee's right to rents, the bankruptcy court insures that the outcome will be the same whether the mortgagee's claim is raised in a federal bankruptcy proceeding, a state court receivership, or an action for foreclosure. Such uniformity of result discourages forum shopping by both the debtor and his creditors, encourages uniformity in the administration of the law of the state, and prevents "a windfall [to the secured creditors at the expense of the unsecured creditors] merely by reason of the happenstance of bankruptcy" *Lewis* v. *Manufacturers Nat. Bank, supra*, 364 U.S. at 603.

2. Moreover, the procedure applicable to the claims of a secured creditor under the Bankruptcy Act is in all significant respects parallel to his rights and remedies under North Carolina law. Because the property was in possession of the trustee, petitioner had three available courses of action, *viz.*, (1) to rely on his security in the property and not file a claim with the bankruptcy court; (2) to surrender his security and prove his entire claim as an unsecured creditor; or (3) to prove his claim as secured to the extent of his security and file a claim as an unsecured creditor with respect to the balance. See *United States Bank* v. *Chase Bank*, 331 U.S. 28, 35 (1947); 3 *Collier, supra*, § 57.07[3], at 169-183. Petitioner chose the third alternative and filed a claim as a secured creditor,[20] thereby subjecting himself to the

[20] If it is determined that there is no equity in the property, the trustee may abandon it to the secured creditors. See 4A *Collier, supra*, § 70.42, at 499. Both the trustee and the bankruptcy court rejected this course of action because the appraisal of the property indicated that the debtor had a substantial equity above the secured creditor's claims. The principal concern of the trustee and court was not the correctness of the appraisal, but whether, because of the unavailability of financing, a forced sale of the property at that time would realize the appraised value (Pet. App. 6a; A. 385a). This uncertainty could not be resolved unless there was a sale. While petitioner suggested that the property be abandoned to the second mortgagees (A. 390a), he did not file a motion to be allowed to reclaim the property, as required by the court in authorizing the arrangement plan (A. 196a), and he did not file a complaint to recover the property as required by Rule 701, Rules of Bankruptcy Procedure. Nor did petitioner appeal from the district court's order under which the property was ultimately sold.

Petitioner appears to contend (Br. 44 *et seq.*) that the trustee took the position that petitioner "should have filed an adversary proceeding to recover the property on which he held a mortgage." This misstates the government's argument. If the trustee had abandoned the property, petitioner would have been entitled to the rents arising after the abandonment. But the trustee believed that the property had value in excess of the security, and the court upheld his refusal to abandon the property. Thus, petitioner's extended discussion as to whether he took the necessary action to have the property abandoned to him under Rule 701 of the Bankruptcy Rules is beside the point. At all events, in authorizing petitioner's mortgage, the bankruptcy court ordered that petitioner could not reclaim the property without formally seeking permission to do so and setting forth his reasons (A. 196a). Petitioner never complied with this order.

jurisdiction of the bankruptcy court and, specifically, Section 57h of the Bankruptcy Act (11 U.S.C. 93 (h)). That provision states:

> The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agree-

ment pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee by agreement, arbitration, compromise or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance. Such determination shall be under the supervision and control of the court.

Section 57h and Rule 306(d), Rules of Bankruptcy Procedure,[21] require that the value of the security be deducted from the debt before a secured creditor may receive any benefit of a distribution out of the assets of the bankruptcy estate. *United States Bank* v. *Chase Bank, supra,* 331 U.S. at 34; 3 *Collier, supra,* § 57.20[1], at 330-333. Where property is sold free and clear of a lien, such as petitioner's second trust, the amount received from the sale may establish the value of the creditor's security for the purpose of applying Section 57h. *Hiscock* v. *Varick Bank of New York, supra; Sehon-Stevenson & Co.* v. *Union Trust Co.*, 113 F. 2d 968 (4th Cir. 1940); *In re Salmon Weed & Co.*, 53 F. 2d 335 (2d Cir. 1931). However, when the amount received from the sale is so grossly inadequate as to justify an inference of fraud or collusion, the proper value of the security may be litigated for the purpose of determining the

[21] Rule 306(d) provides "[i]f a secured creditor files a proof of claim, the value of the security interest held by him as collateral for his claim shall be determined by the court, and the claim shall be allowed only to the extent it is enforceable for any excess of the claim over such value."

secured creditor's entitlement under Section 57h. *Hiscock* v. *Varick Bank of New York, supra,* 206 U.S. at 38; 3 *Collier, supra,* § 57.20[5.21], at 348-351.[22]

When the bankruptcy court ordered a sale of the property in this case, the protections accorded petitioner were therefore parallel to his rights under North Carolina law. If bankruptcy had not intervened and the amount bid in by petitioner or any other purchaser at a foreclosure sale did not fully satisfy the amount due petitioner on his debt, he would have been entitled to pursue the debtor for a deficiency judgment for the balance of the debt. But this deficiency judgment would not be entitled to any priority over other general unsecured claims until docketed, but would merely share in the debtor's other property on a pro rata basis with those other claims.

Here, Section 57h of the Bankruptcy Act requires a similar result. Pursuant to that provision, the bankruptcy court determined the value of the security held by petitioner "by converting the same into money

[22] Even in the absence of fraud, where the amount received from a sale does not reflect the true value of the security and the secured creditor buys the property at the sale, the court, in the proper exercise of its equity powers, may ascertain the true value of the security. See *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank, supra,* 300 U.S. at 131; *Honeyman* v. *Jacobs,* 306 U.S. 539, 543 (1939). Here, there is every indication that the property was worth more than the amount bid in by petitioner. The bankruptcy court, however, allowed the difference between the face value of petitioner's debt and the amount bid in for the property as a general unsecured claim (Pet. App. 13a).

according to the terms of the agreement," *i.e.*, it sold the property at a foreclosure sale. It thereafter credited "the amount of such value * * * upon [petitioner's claim]" and allowed the difference as an unsecured claim against the bankrupt estate. In short, Section 57h, like state law, contemplates a sale of the security as described in the instrument upon which the creditor bases his claim. Since the mortgage did not provide for a security interest in the accrued rents and petitioner took no steps to obtain the incidents of ownership (*i.e.*, the rents) prior to the foreclosure sale,[23] his security interest is necessarily limited to the value obtained at the sale.

3. Finally, the requirement that the mortgagee take affirmative action, consistent with state law, to secure an interest in the rents furthers a more orderly and certain administration of the bankruptcy estate. Such a requirement provides both the bankruptcy court and the parties with early notice of the nature and extent of the mortgagee's claim and enables the court to take that claim into account prior to any sale of the property.

In sum, the consistency of result between state and federal proceedings, the general policy of the

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[23] Compare *Fidelity Bankers Life Insurance Co.* v. *Williams*, *supra*, 506 F.2d at 1243. There, the court held that the mortgagee was entitled to the rents even though he had not taken possession of the property or sought the appointment of a receiver to sequester the rents for his benefit because the mortgagor had executed a supplemental agreement directly assigning all rents to the mortgagee upon default.

Bankruptcy Act that the validity of liens be determined under state law, and the orderly administration of the bankruptcy estate all favor the recognition of the majority view, *viz.*, that when bankruptcy creates a default on a mortgage, the mortgagee is entitled to the rents only when he takes those steps that would gain him a security interest in the rents under state law.

D. The Minority Line Of Decisions Rejecting The Application Of State Law Is Based Upon The Erroneous Premise That Bankruptcy Destroys The Mortgagee's Remedies Under State Law Without Providing An Equivalent Remedy In Bankruptcy

Petitioner rejects the application of the foregoing majority line of decisions holding that state law governs a mortgagee's right to rents accrued during bankruptcy. He relies (Br. 34-40) upon the minority view of the Third and Seventh Circuits that a mortgagee may recover the rents without regard to his right to them under state law if he can establish an "equitable" basis for his claim. *Bindseil* v. *Liberty Trust Co.*, *supra*; *In re Wakey*, *supra*; *In re Pittsburgh-Duquesne Development Co.*, *supra*, 482 F.2d at 246. See also 4A *Collier*, *supra*, § 70.16, at 167-168.

The seminal precedent in this minority line of decisions is *Bindseil* v. *Liberty Trust Co.*, *supra*. There, the court acknowledged that state law generally required the mortgagee to take possession of the property or sequester the rents before he could claim settlement to them (248 F. at 113). The court further observed that prior cases had applied the same rule in bankruptcy. See, *e.g.*, *In re Foster*, 9 F. Cas.

523 (E.D. N.Y. 1872), aff'd, 9 F. Cas. 572 (2d Cir. 1874); *In re Dole*, 110 F. 926 (D.Vt. 1901); *In re Banner*, 149 F. 936 (S.D. N.Y. 1907). The court held, however, that the rents should be awarded to the mortgagee when bankruptcy ensues even though state law did not establish a lien on the rents. The heart of the Third Circuit's reasoning (248 F. at 114) was that "bankruptcy changes the whole situation, takes from the mortgagor his land and its income, and takes from the mortgagee the legal remedies which, but for bankruptcy, he might pursue in reaching rents arising from the mortgaged premises, and gives him in lieu thereof, only such remedies as may be found in a court of bankruptcy in the equitable administration of the bankrupt's assets."

1. *Bindseil* and the decisions following it are based upon the erroneous premise that bankruptcy destroys the mortgagee's state law remedies without providing an equivalent remedy in bankruptcy. As we have pointed out *supra*, pages 38-42, while the bankruptcy court assumes exclusive jurisdiction over the property, vests possession in the trustee, and may enjoin any attempt by the mortgagee to initiate a state court proceeding to gain possession,[24] the mortgagee's remedies in the bankruptcy court are similar to those that would have been available to him in a state court.

For example, the mortgagee could gain possession of the property by consent or judicial action under state law. In bankruptcy, the trustee can abandon

[24] See *Ex parte Baldwin*, 291 U.S. 610, 615 (1934); Rule 601(a) of the Rules of Bankruptcy Procedure.

the property to the mortgagee (see 4A *Collier*, *supra*, § 70.42, at 499 *et seq.*), thereby accomplishing the same result. If the trustee refuses to abandon the property, the mortgagee can litigate the question by filing a complaint to claim the property. See 4A *Collier*, *supra*, § 70.39, at 466. Moreover, upon the commencement of a bankruptcy proceeding, the mortgagee can seek the appointment of a receiver to collect the rents for his benefit. Section 2a(3) of the Bankruptcy Act (11 U.S.C. 11(a)(3)); Rule 201, Rules of Bankruptcy Procedure. Indeed, even after adjudication and the appointment of a trustee, the mortgagee may apply to the court to have the trustee collect and sequester the rents for his benefit. See, *e.g.*, *In re Brose*, *supra*; *In re American Fuel & Power Co.*, *supra*. In cases where the value of the security is inadequate or questionable, the mortgagee is therefore accorded similar remedies in the bankruptcy court to gain an interest in the rents that would otherwise be available if bankruptcy had not occurred. Thus, contrary to the assumption of *Bindseil*, bankruptcy does not cut off the mortgagee's remedies so as to require an "equitable" adjustment of the rights of the parties.[25]

[25] Petitioner asserts (Br. 37) that the reasons for requiring a mortgagee to take possession of the property or to obtain a receiver to sequester the rents are to protect the mortgagee against the loss in value of his security due to the mortgagor's mismanagement. He contends (*ibid.*) that "[t]his idea has no application in a bankruptcy situation because the Court is in possession of the land." But the bankruptcy court does not assume jurisdiction over the bankrupt estate solely for the pro-

2. Moreover, by determining the mortgagee's rights to the rents without regard to state law, *Bindseil* in effect gives the mortgagee a priority status based solely upon "equitable" considerations over the claims of other secured creditors and the general unsecured creditors, including, as in this case, the claims for administration expense. In this respect, *Bindseil* conflicts with the well-settled proposition that Congress, and not equitable principles, establishes the order in which claims are to be paid in bankruptcy. See *Missouri* v. *Ross*, 299 U.S. 72, 74-75 (1936); *United States* v. *Randall*, 401 U.S. 513 (1971); *In re Columbia Ribbon Co.*, 117 F.2d 999, 1001 (3d Cir. 1941).

Bindseil also conflicts with the equality of distribution of the assets of the estate required by the Bankruptcy Act. See Section 65a of the Act (11 U.S.C. 105(a); *United States* v. *Randall*, *supra*. As we have pointed out (*supra*, pages 29-30), the decisions uniformly hold that state law controls the nature and extent of a secured creditor's claims to the assets of the bankrupt.[26] The effect of *Bindseil*, however, is

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tection of a single creditor but to insure the equitable distribution of the estate to all of the creditors in accordance with the priorities established by the Bankruptcy Act.

[26] Petitioner contends (Br. 32) that federal law should supersede state law in determining the extent of his security interest because the bankruptcy court's jurisdiction "has disrupted the mortgage relationship to such an extent that it preempts the field." Like the Third Circuit's rationale in *Bindseil*, this argument rests upon the mistaken notion that bankruptcy cuts off petitioner's remedies under state law without providing him with equivalent remedies in the bankruptcy proceeding.

to encumber additional assets for the benefit of one creditor regardless of his position under state law. As the Third Circuit explained, "[t]his view is not based upon the notion that the mortgage confers a lien on rents, for, of course, it does not; but it is based upon what is conceived to be an equitable adjustment of rights, of which some are obviously superior to others" (248 F. at 114).

But if the mortgagee's security does not extend to the rents under state law, it is difficult to justify the application of any principle that would shift assets from the payment of unsecured claims to secured claims on the basis of some "obvious" equitable superiority. Assuming that the mortgagee's security is inadequate and that there are insufficient funds to satisfy both secured and unsecured claims, the Bankruptcy Act allows the balance of the secured creditor's

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At all events, the decisions uniformly hold that state law determines the extent of the bankrupt's interest and whether that interest passes to the trustee. See, *e.g.* (in addition to the cases cited *supra*, page 30), *Pearlman* v. *Reliance Ins. Co.*, 371 U.S. 132, 136 (1962); *Hayes* v. *Schaefer*, 399 F.2d 300, 301 (6th Cir. 1968); *In re Wetteroff*, 453 F.2d 544, 546 (8th Cir. 1972); *Wiley* v. *Public Investors Life Insurance Co.*, 498 F.2d 101, 103 (5th Cir. 1974); *In re McClain*, 447 F.2d 241, 243-244 (10th Cir. 1971); *State of Ohio* v. *Four Seasons Nursing Centers of America, Inc.*, 465 F.2d 25, 27-28 (10th Cir. 1972). Creditors' rights and powers in bankruptcy are likewise determined under state law. *E.g.*, *Bass* v. *Aetna Factors Co.*, 272 F.2d 707 (9th Cir. 1959); *Martin* v. *Crocker-Citizens National Bank*, 349 F.2d 580 (9th Cir. 1965); *Willard* v. *Petruska*, 356 F.2d 422 (5th Cir. 1966); *In re Luther*, 465 F.2d 19, 20 (9th Cir. 1972).

claim above the value of his security as an unsecured claim to be shared ratably with the general unsecured creditors. See Sections 57h and 65 of the Act (11 U.S.C. 93(h) and 105). The proper application of equity jurisdiction is to reject advantages to some creditors at the expense of other creditors. See *Pepper* v. *Litton*, 308 U.S. 295 (1939), and discussion, *supra*, pages 26-28.

Simply put, the result of *Bindseil* is to place the mortgagee in a better position when bankruptcy ensues than he would have had in a nonbankruptcy setting. See Comment, *The Mortgagee's Rights to Rents and Profits Following a Petition in Bankruptcy*, 60 Iowa L. Rev. 1388, 1400 (1975). See also 4A *Collier*, *supra*, § 70.16, at 167-168. Indeed, if the Third Circuit's rationale is carried to its logical conclusion, in any case where the security is insufficient, a mortgagee would be allowed to prevail over the general creditors even though he would not be entitled to obtain even a deficiency judgment under state law. See, *e.g.*, N.C. Gen. Stat. § 45-21.38 (1976 Repl.). Such a windfall should not be permitted in a bankruptcy proceeding. To the contrary, the rights of secured creditors should be determined strictly in accordance with the security agreement, and the effect of that agreement under state law.

3. Finally, we submit that the equitable approach of *Bindseil* would foster uncertainty as to the financial condition of the bankrupt estate and disrupt its subsequent distribution. Under the equitable view, the mortgagee is not required to take any action that

would provide notice of his claim to interested parties. But the mortgagee is generally in a better position than the other creditors to evaluate the adequacy of his security. It surely would be better practice to require the mortgagee to notify the court that the value of his security is questionable at an early stage of the proceeding so that the court may consider the possibility that he may claim the rents. Like any other creditor, a mortgagee should advance his claim in such a manner as to put the court, the trustee and the other creditors on timely notice, rather than waiting until the estate has been liquidated and largely distributed.

Indeed, the facts of this case illustrate this point with particular force. Here, when the bankruptcy court ordered the trustee not to make payments to the mortgagees, it expressed a concern (A. 799a) that the funds could be needed to pay expenses of administration, which, in fact, turned out to be the case. Nothing in the record indicates that petitioner objected to this order. In fact, when he filed his proof of claim, he asserted a security interest only in the property and not in the rents (A. 443a). However, if petitioner had taken affirmative action in the bankruptcy court to seek to have the rents collected for his benefit in the event the security was inadequate, the trustee and other creditors would have been informed of the extent of his claim and may well have avoided the uncertainties in the distribution of the estate occasioned by petitioner's eleventh-hour claim for the rents.

E. The Court Of Appeals Correctly Held That Petitioner Did Not Take Sufficient Action In The Bankruptcy Proceeding To Qualify For A Security Interest In The Rents Under North Carolina Law

Even on the assumption that the court of appeals correctly concluded that the question of the mortgagee's entitlement to rents was determined by reference to state law, petitioner argues (Br. 41-50) that he took sufficient action during the bankruptcy proceeding to gain a security interest in the rents under the law of North Carolina. The sole basis for petitioner's contention is that the debtor moved in the arrangement proceeding to have an agent appointed to collect the rents and to apply "the funds to those debts approved for payment by this Court" (A. 203a). The court appointed an agent to collect the rents and to apply them to income taxes, first mortgage payments, property taxes, insurance premiums and second mortgage payments (A. 205a-206a). In petitioner's view, this order, designating an agent for the debtor to collect the rents, established a receivership for the purposes of securing the mortgagee's rights to the rents.

To begin with, the disputed rents in this case are not those collected by the agent during the arrangement proceeding but those collected by the trustee after adjudication of bankruptcy. More important, however, the record squarely refutes petitioner's contention that a receivership was ever established to collect the rents for his benefit. At the time the agent was appointed during the Chapter XI proceedings, Golden's real estate operations were its only income-

producing activity. The agent was appointed "to collect rents and to apply the proceeds under the supervision of the Court" (A. 204a). But Golden was still in possession of the property, and there was no suggestion that the agent was intended to divest the rights of Golden or its other creditors to the rents in favor of the second mortgagee. Indeed, Golden's motion to appoint an agent requested that the excess rents, after first mortgage, tax, and insurance payments, be accumulated for the benefit of the second mortgagees *and* "the unsecured creditors" (A. 203a).[27] Thus, the appointment of an agent was nothing more than an administrative order to facilitate collection of the rents; it altered no existing rights of Golden or its creditors to the rents.[28] Moreover, since

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[27] Although the bankruptcy court subsequently issued a Disbursement Order (A. 229a-235a) permitting disbursements to the first and second mortgage holders, petitioner was willing to forego receiving these payments (A. 275a). Furthermore, it does not appear that this order was ever implemented during the arrangement proceeding, and it was never implemented during the liquidation proceeding (see page 52, *infra*). Thus, petitioner properly refrains from relying on this order.

[28] The court of appeals (Pet. App. 36a) mistakenly referred to the agent as a receiver. Relying on this characterization, petitioner contends (Br. 50-55) that the court erroneously held that the Chapter XI proceedings were not a part of bankruptcy. But whether or not the agent is properly characterized as a receiver, the significant fact is that he was not appointed solely to protect petitioner's interest but to protect the interests of all creditors. There is accordingly no basis for petitioner's contention that a receiver was appointed to collect the rents for his benefit.

Golden did not default on payments to petitioner until October 31, 1974 (A. 266a-268a), there would have been no reason for the court to have appointed a receiver solely for petitioner's benefit.

This construction is not only supported by the terms of the order but also by petitioner's actions subsequent to its issuance. After Golden was adjudicated a bankrupt, the trustee was appointed. His authority superseded that of the agent, and he was specifically instructed to collect the rents "and to hold and retain all moneys thus received to the end that the same may be applied under this or different or further orders of this Court" (A. 343a). While the bankruptcy court's order gave the trustee the authority to make certain payments, it did not authorize him to make payments on the mortgages (A. 341a-342a). Neither petitioner nor the other second mortgagees objected to this order.

Petitioner submits, however, that the court's reference to "different" orders refers to the order appointing the agent. He therefore concludes that the trustee collected the rents for his benefit (see Br. 51). But this contention misconceives the effect of the appointments of the agent and trustee; neither order purported to instruct the agent or the trustee to sequester the rents for petitioner's benefit.[29] Moreover, on July

[29] Even assuming that petitioner might not have apprehended the proper significance to be given to the court's order, the trustee, shortly after his appointment, notified petitioner that the bankruptcy court had ordered the trustee not to make any payments on the mortgages (A. 799a). Thus, any possible reliance petitioner may have placed upon the order appointing the agent would have been dispelled at that time. Thereafter, the rents accrued monthly, and the trustee filed monthly reports showing receipts and disbursements; neither petitioner nor the first mortgagees, however, interposed any objection.

1, 1975, petitioner filed his claim as a secured creditor and he stated that he did not "hold * * * any security for the debt * * * for the claimant's use except * * *" the note and deed of trust (A. 443a). When this claim was filed, the trustee had collected more than $82,000 in rents (A. 436a). Petitioner thus expressly limited his claim for a security interest to the value of the property without regard to the rents.[30]

Indeed, after the property was sold, petitioner accepted a deed from the trustee which specifically did not convey to him rights to the collected and accrued rents, but reserved them to the trustee (A. 672a-673a). Petitioner did not object to this provision in the deed.

In short, neither the court, the other creditors, nor petitioner himself ever regarded the order appointing the agent to collect the rents during the arrangement proceeding as providing for the sequestration of rents solely for petitioner's benefit. And petitioner neither sought nor obtained an order in the liquidation proceeding to have the trustee collect the rents for his

[30] Prior to this time, the United States had filed proofs of claims for taxes (A. 95a, 197a), and, shortly thereafter, attorneys for the creditors' committee filed applications for fees (A. 475a, 572a). Even though petitioner was aware that the assets of the estate were limited, and that there were substantial adverse claims to the fund, he took no steps to insure that the rents were being collected for his benefit.

benefit. The record therefore convincingly demonstrates the correctness of the court of appeals' conclusion that petitioner did not take sufficient steps during the bankruptcy proceeding to qualify for a security interest in the rents under North Carolina law.[31]

Finally, petitioner argues (Br. 38) that his claim should not be defeated by a "technical rule" requiring specific sequestration of the rents. But as we have pointed out *supra*, the rule petitioner condemns as "technical" is in accord with the general policy of the Bankruptcy Act to determine the validity of liens under state law and fosters uniformity of result between federal and state proceedings. Moreover, as a practicing lawyer in North Carolina, petitioner can hardly claim ignorance of the law of that jurisdiction, especially when the rule in question has been extant for almost a century. Thus, the requirement that the mortgagee establish possession of the property or sequester the rents for his benefit is neither technical nor esoteric.

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[31] While the district court expressed the view (Pet. App. 27a) that the trustee "continued to collect these rents and profits, and to hold them in accordance with the original order," it, like petitioner, misapprehended the effect of the original order. Contrary to the district court's assumption, that order issued during the arrangement proceeding did not require the collection of rents solely for petitioner's benefit but provided for their collection for the benefit of all of Golden's creditors (A. 203a). Thus, as the court of appeals correctly observed (Pet. App. 36a), "manifestly, what the district court thought was being done was not being done."

Nor can petitioner fairly accuse (Br. 37 *et seq.*) the bankruptcy court of delay that reduced the proceeds of the foreclosure sale. As we have pointed out (*supra*, pages 38-39, note 20), the bankruptcy court postponed the sale of the property until financing became more generally available. Surely, it was within the sound discretion of the bankruptcy court to take the availability of local mortgage money into account in fixing the date of sale.

Indeed, the facts of this case establish that any delay is properly attributed to petitioner in advancing his claim to a security interest in the rents. Here, the mortgage was placed upon the property by the bankruptcy court during an attempted resuscitation of the debtor in the Chapter XI arrangement.[32] It contained no provision with respect to rents in the event of default. Moreover, the arrangement plan to which petitioner and the other holders of the trust agreed (A. 162a) did not provide for any security interest in the rents. In fact, petitioner did not claim the rents even when the trustee notified him that the secured creditors would not be paid but delayed making his claim until after the property had been conveyed to him. Finally, petitioner agreed that he would not foreclose or reclaim the property without approval of the court upon a showing of justification (A. 196a). In these circumstances, petitioner can

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[32] In part, the trust under which petitioner claims the rents replaced a prior trust held by petitioner and McKaughn. The later trust, however, was not an extention of the earlier one. Both the amount of the indebtedness and the creditors secured by the trust were altered (see A. 156a-157a).

hardly complain that the bankruptcy court's delay in selling the property undermined his position when he had ample opportunity to request that his security interest extend to the rents but failed to do so.

F. Petitioner Would Not Be Entitled To The Rents Even Under The Minority View Rejecting The Application Of State Law In Favor Of Equitable Principles

As we have argued in the foregoing portions of this brief (*supra*, pages 36-43), the majority line of decisions holding that state law governs a mortgagee's right to rents are in accord with the established policy of the Bankruptcy Act that state law determines the validity of the interests of secured creditors. But even if the Court were to reject our submission in favor of the equitable approach of the minority view, petitioner would not be entitled to the rents.

The equitable approach of the *Bindseil* line of decisions is based upon the notion that the mortgagee has a better equitable claim to the rents, as security for his debt, than the unsecured creditors. Since the purpose of a mortgage is to secure an obligation of the debtor, if the mortgagee takes possession of the property, he is accountable and must turn over to the mortgagor any excess of rents or profits received prior to the sale above the amount required to make him whole. When bankruptcy occurs, the trustee succeeds to the rights of the bankrupt and would be entitled to the same rights for an accounting and to any excess. Accordingly, under the equitable rule of the Third and Seventh Circuits, if the mortgagee has been made whole on his debt, he cannot claim the

rents as a matter of equity. See *Honeyman* v. *Jacobs*, 306 U.S. 539 (1939); *Richmond Corp.* v. *Wachovia Bank*, *supra*. The mortgagee therefore is not entitled to the rents unless he establishes that "the mortgaged property was worth less than the mortgaged indebtedness." *In re Cigar Stores Realty Holdings*, *supra*, 69 F.2d at 824. See also 4A *Collier*, *supra*, § 70.16, at 168 n.46.

Here, petitioner has not established the existence of any deficiency between his debt and the value of the property. Indeed, the record establishes that the value of the property he received was greater than the amount of his security.

Petitioner's claim to the rents is based on an alleged loss measured by the difference between the face amount of the mortgage ($360,000) and the bid-in price of $174,000. He relies entirely on these figures as proof that he has not been made whole. However, shortly after the sale of the property to him, petitioner refinanced Tracts I, II and III. After this refinancing, the new trusts on the properties totalled $587,000,[33] and, after paying the prior first trusts and expenses of refinancing, petitioner received a net amount in cash of $130,981.23.[34] Thus, as the trustee's uncontradicted affidavit states (A. 780a), assuming that the lending institutions required no margin of security, the value of petitioner's security

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[33] Trade I—$85,000 (A. 779a); Tract II—$212,000 (A. 778a); Tract III—$290,000 (A. 778a).

[34] Tract I—$36,479.49 (A. 779a); Tract II—$28,034.24 (A. 778a); Tract III—$66,467.50 (A. 778a).

in these three tracts was at least $130,981, measured by the excess cash he received over the prior first trusts.

Moreover, the record shows that petitioner sold a portion of Tract IV and received, after paying the first mortgage and expenses, $162,049 in cash (A. 777a). The appraised value of the retained portion of Tract IV was $50,000 (A. 779a). Thus, the conservative value of petitioner's security in the four tracts was at least $343,030.[35] Finally, the record shows that petitioner's investment in the mortgage was not the face amount of $360,000, but was only $272,000 (A. 780a), leaving an excess of the value of the security over his investment of approximately $71,030 ($343,030 − $272,000).

Petitioner did not challenge the correctness of this analysis in the district court; indeed, he concedes (Pet. 22) that he profited on the sale of Tract IV by "no more than $165,225.45." He nevertheless argues (Br. 50) that these facts were "based purely on information contained in the public records * * * and in no way represent[ed] the costs incurred by [him]." But nowhere in the record are there any facts, or indeed a proffer of facts, suggesting why

[35] Assuming that a reasonable margin of security was required, the value of petitioner's security would approximate the excess cash he received over the amounts of the first trusts plus the appraised value of the retained land, as follows:

Indicated value of security in Tracts I-III	$130,981
Indicated value of security in Tract IV (sold)	162,049
Indicated value of security in Tract IV (retained)	50,000
	$343,030

these public records are unreliable or that the trustee's uncontradicted affidavit is inaccurate. Thus, from the record, it would appear that petitioner realized on his security approximately $70,000 more than his investment in the mortgage. In these circumstances, the court of appeals correctly concluded (Pet. App. 38a) that even "[i]f equity has a part in the resolution of a question of this type * * * equity does not supply the answer here."

Contrary to petitioner's suggestion (Br. 49-50), we do not contend that it was improper for him to realize a profit on his investment. Our purpose in calling these portions of the record to the attention of the Court is to show that it would be a highly improper exercise of the bankruptcy court's equity powers to allow petitioner a further profit by shifting the rents to him at the expense of the claims of other creditors. While the balance of petitioner's claim may be allowable as an unsecured claim under Section 57h, a result which one commentator characterizes as "deplorable" in its unfairness to the other creditors and calling for legislative action (3 *Collier*, *supra*, § 57.07[2], p. 166), it is quite a different matter to provide petitioner with an additional windfall in the form of a security interest in the rents to the detriment of the other creditors.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Bankruptcy Act, 30 Stat. 544, as amended (11 U.S.C. 1 *et seq.*):

Section 57. *Proof and allowance of claims.*

a. A proof of claim shall consist of a statement, in writing and signed by a creditor, setting forth the claim; the consideration therefor; whether any and, if so, what securities are held therefor; and whether any and, if so, what payments have been made thereon; and that the claim is justly owing from the bankrupt to the creditor. A proof of claim filed in accordance with the requirements of this title, the General Orders of the Supreme Court, and the official forms, even though not verified under oath, shall constitute prima facie evidence of the validity and amount of the claim.

* * * * *

h. The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee by agreement, arbitration, compromise or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance. Such determination shall be under the supervision and control of the court.

* * * * *

[11 U.S.C. 93.]

Section 60. *Preferred creditors.*

a. (1) A preference is a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this title, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

* * * * *

b. Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: *Provided, however*, That where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him. Where a preference by way of lien or security title is voidable, the court may on due notice order such lien or title to be preserved for the benefit of the estate, in which event such lien or title shall pass to the trustee. For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which

would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction.

* * * * *

[11 U.S.C. 96.]

Section 67. *Liens and fraudulent transfers.*

a. (1) Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this title by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent or (b) if such lien was sought and permitted in fraud of the provisions of this title: *Provided, however*, That if such person is not finally adjudged a bankrupt in any proceeding under this title and if no arrangement or plan is proposed and confirmed, such lien shall be deemed reinstated with the same effect as if it had not been nullified and voided.

* * * * *

d. (1) For the purposes of, and exclusively applicable to, this subdivision: (a) "Property" of a debtor shall include only his nonexempt property; (b) "debt" is any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent; (c) "creditor" is a person in whose favor a debt exists; (d) a person is "insolvent" when the present fair salable value of his property is less than the amount required to pay his debts; and to determine whether a partnership is insolvent,

there shall be added to the partnership property the present fair salable value of the separate property of each general partner in excess of the amount required to pay his separate debts, and also the amount realizable on any unpaid subscription to the partnership of each limited partner; and (e) consideration given for the property or obligation of a debtor is "fair" (1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred or an antecedent debt is satisfied, or (2) when such property or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property or obligation obtained.

(2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; or (b) as to then existing creditors and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred without fair consideration by a debtor who is engaged or is about to engage in such business or transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent; or (c) as to then existing and future creditors, if made or incurred with-

out fair consideration by a debtor who intends to incur or believes that he will incur debts beyond his ability to pay as they mature; or (d) as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors.

(3) Every transfer made and every obligation incurred by a debtor who is or will thereby be rendered insolvent, within four months prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent, as to then existing and future creditors: (a) if made or incurred in contemplation of the filing of a petition initiating a proceeding under this title by or against the debtor or in contemplation of liquidation of all or the greater portion of the debtor's property, with intent to use the consideration obtained for such transfer or obligation to enable any creditor of such debtor to obtain a greater percentage of his debt than some other creditor of the same class, and (b) if the transferee or obligee of such transfer or obligation, at the time of such transfer or obligation, knew or believed that the debtor intended to make such use of such consideration. The remedies of the trustee for the avoidance of such transfer or obligation and of any ensuing preference shall be cumulative: *Provided, however,* That the trustee shall be entitled to only one satisfaction with respect thereto.

(4) Every transfer of partnership property and every partnership obligation incurred within one year prior to the filing of a petition initiating a proceeding under this title by or against

the partnership, when the partnership is insolvent or will be thereby rendered insolvent, is fraudulent as to partnership creditors existing at the time of such transfer or obligation, without regard to actual intent if made or incurred (a) to a partner, whether with or without a promise by him to pay partnership debts, or (b) to a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners.

(5) For the purposes of this subdivision, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, but, if such transfer is not so perfected prior to the filing of the petition initiating a proceeding under this title, it shall be deemed to have been made immediately before the filing of such petition.

(6) A transfer made or an obligation incurred by a debtor adjudged a bankrupt under this title, which is fraudulent under this subdivision against creditors of such debtor having claims provable under this title, shall be null and void against the trustee, except as to a bona fide purchaser, lienor, or obligee for a present fair equivalent value: *Provided, however*, That the court may, on due notice, order such transfer or obligation to be preserved for the benefit of the estate and, in such event, the trustee shall succeed to and may enforce the rights of such transferee or obligee: *And provided further*, That such purchaser, lienor, or obligee, who

without actual fraudulent intent has given a consideration less than fair, as defined in this subdivision, for such transfer, lien, or obligation, may retain the property, lien, or obligation as security for repayment.

(7) Nothing contained in this subdivision shall be construed to validate a transfer which is voidable under section 96 of this title.

e. For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction.

f. (1) For the purposes of, and exclusively applicable to, this subdivision (a) "debtor" shall mean a face-amount certificate company as defined in section 80a-4 of title 15; "face-amount certificate" shall mean a face-amount certificate as defined in section 80a-2 of title 15; (c) "depositary" is a person or State agency with whom securities or other property of a debtor is deposited or to whom property of a debtor is transferred, in trust or otherwise, pursuant to the requirements of a State law or an agreement by the debtor providing for the distribution of such property or its proceeds to creditors or security holders of the debtor in the event of the insolvency of the debtor or under other specified circumstances; (d) "deposit creditor" is a creditor who, under the provisions of a State law or agreement providing for a deposit with or transfer to a depositary, has rights as to the securities or property so deposited or transferred which exceed the rights of a general creditor;

and (e) "State agency" is an official or agency of a State designated to act as depositary or to distribute property or the proceeds of property held by a depositary.

(2) Every deposit or transfer of securities or other property made by or on behalf of a debtor with or to any depositary for the benefit or protection of or to secure the holder of any security sold by or on behalf of the debtor on or after January 1, 1941, shall be voidable as against the trustee of such debtor if the property of the estate is insufficient for the full payment and discharge of all claims on account of all face-amount certificates sold by or on behalf of the debtor, and such deposit or transfer and every lien created thereby shall thereupon be avoided by the trustee subject to the provisions of paragraph (3) of this subdivision.

(3) In the event any deposit or transfer described in paragraph (2) of this subdivision shall be avoided the trustee shall segregate the property received by the trustee from the depositary and charge the same with the costs and expenses of maintenance and liquidation and distribute the net proceeds thereof to the creditors who would have been entitled thereto under the provisions of the law or agreement providing for the deposit or transfer of the property and each such creditor shall thereafter be entitled to dividends from the estate only after all creditors of the same rank shall have received the same percentage.

(4) The court shall have summary jurisdiction of any proceedings to hear and determine the rights of any parties under this subdivision and

to hear and determine the sufficiency of the property of the estate for the full payment and discharge of all claims on account of all face-amount certificates sold by or on behalf of the debtor. Due notice of any hearing in such proceedings shall be given to every depositary and State agency which is a party in interest.

(5) Where the provisions of subsection (c) of section 28 are not applicable, the provisions of this section will not apply.

[11 U.S.C. 107.]

Section 70. *Title to property.*

a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trademarks, and in applications therefor: *Provided,* That in case the trustee, within thirty days after appointment and qualification, does not notify the applicant for a patent, copyright, or trade-mark of his election to prosecute the application to allowance or rejection, the bankrupt may apply to the court for an order revesting him with the title thereto, which petition shall be granted unless for cause shown by the trustee the court grants further time to the trustee for making such election; and such applicant may, in any event, at any time petition the court to be revested with such title

in case the trustee shall fail to prosecute such application with reasonable diligence; and the court, upon revesting the bankrupt with such title, shall direct the trustee to execute proper instruments of transfer to make the same effective in law and upon the records; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person; (4) property transferred by him in fraud of his creditors; (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided*, That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process: *And provided further*, That when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the

policy shall pass to the trustee as assets; (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property; (7) contingent remainders, executory devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were nonassignable prior to bankruptcy and which, within six months thereafter, become assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estates; and (8) property held by an assignee for the benefit of creditors appointed under an assignment which constituted an act of bankruptcy, which property shall, for the purposes of this title, be deemed to be held by the assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court.

All property, wherever located, except insofar as it is property which is held to be exempt, which vests in the bankrupt within six months after bankruptcy by bequest, devise or inheritance shall vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date when it vested in the bankrupt, and shall be free and discharged from any transfer made or suffered by the bankrupt after bankruptcy.

All property, wherever located, except insofar as it is property which is held to be exempt, in which the bankrupt has at the date of bankruptcy an estate or interest by the entirety and which within six months after bankruptcy becomes transferable in whole or in part solely by

the bankrupt shall, to the extent it becomes so transferable, vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date of bankruptcy.

The title of the trustee shall not be affected by the prior possession of a receiver or other officer of any court.

* * * * *

c. The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitations, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee shall have as of the date of bankruptcy the rights and powers of: (1) a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such a creditor exists, (2) a creditor who upon the date of bankruptcy obtained an execution returned unsatisfied against the bankrupt, whether or not such a creditor exists, and (3) a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists. If a transfer is valid in part against creditors whose rights and powers are conferred upon the trustee under this subdivision, it shall be valid to a like extent against the trustee. In cases where repugnancy or inconsistency exists with reference to the

rights and powers in this subdivision conferred, the trustee may elect which rights and powers to exercise with reference to a particular party, a particular remedy, or a particular transaction, without prejudice to his right to maintain a different position with reference to a different party, a different remedy, or a different transaction.

* * * * *

[11 U.S.C. 110.]

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IN THE
SUPREME COURT OF THE UNITED STATES
Fall Term, 1978

No. 77-1410

IN THE MATTER OF:
Golden Enterprises, Inc., Bankrupt

William E. Butner, Petitioner,

vs.

Joe N. Cagle, Trustee in Bankruptcy for Golden Enterprises, Inc.; Attorneys for the Creditors' Committee; James M. Gaither, Jr., Attorney for Bankrupt; Golden Enterprises, Inc., Bankrupt; William J. Lawing, CPA for Bankrupt; and Charles B. Camp, Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit
Petition for Certiorari Filed April 4, 1978
Certiorari Granted June 12, 1978

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinions of the Bankruptcy Court (App. to Pet. for Cert. pp. 2a-20a) and the District Court (App. to Pet. for Cert. pp. 21a-30a) are unreported. The opinion of the Court of Appeals (App. to Pet. for Cert. pp. 31a-43a) is reported at 566 F. 2d 1207.

JURISDICTION

The judgment of the Court of Appeals was entered on December 8, 1977 (App. to Pet. for Cert. pp. 31a-43a) and a petition for rehearing was denied on January 6, 1978 (App. to Pet. for Cert. p. 44a). The petition for Writ of Certiorari was filed on April 4, 1978, and granted on June 12, 1978.

QUESTION PRESENTED

Whether under federal bankruptcy, the second mortgagee of real property is entitled to rents accruing during the period from the initiation of liquidation proceedings to the Trustee's sale of such real property, where the second mortgagee does not have a lien on the rents under North Carolina law, the second mortgagee does not seek to foreclose his mortgage, the second mortgagee does not seek to have the rents sequestered for his benefit, and the second mortgagee has no equitable basis for his claim, either during the arrangement phase or liquidation phase of proceedings under the U.S. Bankruptcy Act.

STATEMENT

Golden Enterprises, Inc. ("Golden") was incorporated under the laws of the State of North Carolina in 1968. On May 4, 1973, Golden filed a Petition in Bankruptcy for an Arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C. Section 701, et. seq.. The Bankruptcy Docket of Golden reflects that it was very active during the arrangement period, involving many unique and complex Adversary Proceedings, negotiations, Court Hearings, sales, refinancing of loans, completion of buildings, and many other matters as the record reflects. During the arrangement period, the secured parties cooperated fully with the Creditors Committee and Golden. In fact, everyone cooperated fully during this period in Golden's effort to pay its creditors.

A Plan of Arrangement was approved by the Creditors Committee and the Court and was accepted by a majority in kind and amount of the unsecured creditors. The plan called for sums to be paid to creditors from the sale of merchandise from debtor's stores initially with the balance to be paid from excess rental income derived from extensive real estate owned by debtor in Catawba County, North Carolina. The several parcels of real estate were subject to various first Deeds of Trust to different lending institutions and a second Deed of Trust

to William E. Butner (Petitioner) and Robert L. McKaughn, Jr. for $250,000,evidencing their joint loan to Golden.

Because of the severe economic recession existing in early 1974, the Plan of Arrangement was amended on April 17, 1974, to provide for completion of a 46,000 sq. ft. warehouse building and to join in interest the Petitioner, McKaughn, and Jack Sipe Construction Company. The transaction was evidenced by a $360,000 Deed of Trust on Golden's real estate which was subject to the first Deeds of Trust. This new Deed of Trust was dated July 1, 1974, and recorded July 22, 1974, in the office of the Register of Deeds, Catawba County, in Book 1051 at page 184. This Deed of Trust and the Note secured thereby was subject to the following conditions imposed by the Bankruptcy Court:

a. It was to bear interest at the rate of 10% per annum.

b. The holders of the Deed of Trust were not to foreclose except upon notice to all parties and with the permission of the Bankruptcy Court. (App. p. 195a)

This Deed of Trust did not provide for any security interest in, or an assignment of, the rents in event of default. Also, there was no separate Assignment of Rents executed or recorded in this transaction.

Prior to the transactions discussed in the foregoing paragraph, an agent had been appointed upon motion filed by Golden on April 18, 1974, to collect rental income and to pay Federal and State income taxes, first mortgage holders, ad valorem tax authorities, insurance premiums, and second mortgage holders (App. p. 204a). The Motion noted that an agent was needed because no assets of debtor remained except real estate and there were no employees available to perform the services requested therein (App. p. 202a). The agent collected rents and made payments pursuant to the Order until adjudication of bankruptcy on February 14, 1975. The agent paid Petitioner, et al., according to the terms of the Deed of Trust through November 1974 (App. p. 271a, 279a).

Between April 1974 and the date of adjudication, Golden experienced continuing difficulties with cash flow due to the loss of certain tenants. Petitioner received no interest payments beyond the month of November 1974.

However, the Plan of Arrangement was not successful and Golden was adjudged a Bankrupt on February 14, 1975, and the proceeding was converted into a liquidating bankruptcy. Joe N. Cagle was appointed the Trustee and the first meeting of creditors was held on April 16, 1975. At the initial meeting of creditors, Petitioner requested

that the real estate be abandoned to him, subject to the first mortgages. While not directly opposing the abandonment, the Trustee suggested a foreclosure sale of the real estate.

During the ensuing liquidating bankruptcy, the Trustee collected the rents but by instruction of the bankruptcy court made no payments to Petitioner. Petitioner took no steps to appeal these instructions.

In 1975, the assets of the Bankrupt consisted primarily of six (6) tracts of real estate. Most of the buildings on the various parcels were already rented at the time that Golden was adjudged a Bankrupt. Thereafter, pursuant to Bankruptcy Court approval, the Trustee rented certain portions of the other parcels of real estate.

Two (2) of the tracts consisted of vacant land which was subject to an outstanding first Deed of Trust in favor of First Citizens Bank & Trust Company. On May 27, 1975, First Citizens Bank & Trust Company filed an Adversary Proceeding as required by Bankruptcy Rule 701 in the Bankruptcy Court seeking to recover the two parcels of land subject to its lien from this Bankruptcy Proceeding so that it could pursue the available foreclosure remedies under the laws of the State of North Carolina. By Order of June 4, 1975, the Bankruptcy Judge released the two parcels of land from this Bankruptcy Proceeding to First Citizens Bank & Trust Company.

The remaining four (4) tracts of land were encumbered with four separate first mortgages from different lending institutions. All four tracts were encumbered with the one "blanket" second mortgage which was effected during the arrangement period. This second mortgage was for the total sum of $360,000.00, which arose from the balance owed on a construction contract to Jack Sipe Construction Company ("Sipe") in the sum of $110,000.00 and joint loan of $250,000.00 from Robert L. McKaughn, Jr. ("McKaughn") and William E. Butner ("Butner"). It should be noted again that the second mortgage did not provide for any security interest in, or an assignment of, the rents in event of default. Certain tax liens were also outstanding.

On or about June 11, 1975, the Trustee filed an Adversary Proceeding in the Bankruptcy Court pursuant to Part VII of the Bankruptcy Rules (App. p. 421a) seeking to sell the four tracts of real estate subject to the first mortgages but free and clear of the second mortgage and other liens. The secured parties were joined as party Defendants. Butner (as well as Sipe and McKaughn) cooperated fully in that proceeding and, in fact, Butner filed no Answer. The other secured parties filed Answers and consented to the sale being made in that manner. The hearing was held, after notice,

and the Bankruptcy Judge entered the Order for Sale on June 30, 1975. No creditor appeared at the Hearing to object to this Order. The Order authorized and directed the Trustee to sell the real estate subject to the first mortgages but free of the second liens, with their liens transferred from the real estate to the proceeds of the sale.

No appeal was taken from the Order of June 30, 1975, and it became final ten days thereafter under Bankruptcy Rule 803. The Trustee held the public sale on July 28, 1975, after much advertisement and notice to creditors, in accordance with the Bankruptcy Rules and the Order of the Court.

The tracts were sold separately. The Bankruptcy Judge confirmed the sale of two tracts and did not confirm the sale of the remaining two tracts. From the Confirmation Order entered August 11, 1975, Butner appealed to the United States District Court.

On November 7, 1975, the District Court ordered that a resale be made subject to the first mortgages and taxes with the lien of all subsequent lienholders (including the second mortgage) transferred and attached to the proceeds of the sale, said resale to be held on November 12, 1975. By the terms of the aforesaid Order of the District

Court, Butner and McKaughn and Sipe were permitted to bid at the resale the amount of their second mortgage in lieu of a cash bid. Butner had acquired the interests of McKaughn and Sipe in the second mortgage prior to the resale. At the resale, Butner became the highest bidder at the price of $174,000.00.

Butner received a Deed to the real estate from the Trustee on or about November 25, 1975, which Deed specifically reserved the rents derived from the real estate to the Trustee (App. p. 658a).

The balance of Butner's second mortgage claim in the sum of $186,000.00 was allowed as an unsecured claim by the Bankruptcy Court at the final meeting of creditors.

After acquiring title to the property, Butner filed a Motion for distribution of funds on December 1, 1975, and requested that the rental income held by the Trustee be distributed to him. The Motion was heard at the final meeting of creditors on June 4, 1976, and was denied.

Butner appealed the order of the Bankruptcy Judge to the United States District Court for the Western District of North Carolina, where the Honorable Woodrow W. Jones, Chief Judge, reversed and vacated the

Bankruptcy Judge's denial of Butner's claim upon the rents derived from the encumbered real estate as additional security for his indebtedness. (App. to Pet. for Cert., pp. 21a-30a) From the order of the District Court, the United States and the Trustee, et al., appealed to the United States Court of Appeals for the Fourth Circuit where the United States' appeal on its tax claim was consolidated with the appeal of the Trustee, et al., for briefing and argument. The appeal was heard on October 4, 1977, and on December 8, 1977, the Fourth Circuit Court of Appeals, Senior Circuit Judge Bryan dissenting, reversed the judgment of the District Court and remanded the case for compliance with the final order of the Bankruptcy Court. (App. to Pet. for Cert. pp. 31a-42a) Butner's petition for a rehearing was denied by the Court of Appeals on January 6,1978, (App. to Pet. for Cert. p. 43a) and his motion for a stay of mandate pending petition for writ of certiorari to the United States Supreme Court was denied on January 16, 1978. (App. to Pet. for Cert. p. 44a) Butner petitioned the United States Supreme Court for a writ of certiorari on March 28, 1978, and certiorari was granted on June 12, 1978.

SUMMARY OF ARGUMENT

Upon adjudication, a Trustee in bankruptcy takes title to all of a bankrupt's real property subject to all valid liens thereon. The nature and extent of those liens are determined by reference to the state law of the situs of the property.

In this case, Butner had a second mortgage on the bankrupt's real estate. He did not have a lien upon rental income derived from the property under state law or by contract. In North Carolina the mortgagor in possession, even after default, is entitled to the rents from mortgaged property until the property is foreclosed. Nor did Butner take steps during the arrangement proceeding or subsequent liquidating bankruptcy to create or perfect a security interest in rents.

An agent was appointed during the arrangement proceeding to collect the rents and pay certain

debts, including that of Butner. The order was not the result of any adversary hearing, however, and decided no substantive rights in respect to the rents.

After taking title, the Trustee had no notice of Butner's claim to rents until after the real property was sold by the Trustee and purchased by Butner. Butner's Proof of Claim made no claim for the rents, nor did Butner claim the rents during the Adversary Proceeding instituted by the Trustee under Part VII of the Bankruptcy Rules to sell the real property free of Butner's lien.

The Trustee sold the real estate free of the second mortgage with the lien of the second mortgage transferred to the proceeds of the sale. After the sale, the lien of the second mortgage on the real estate was extinguished; it was transferred to the proceeds of the sale.

The Trustee's sale served to place a value on the second mortgagee's only security for his debt.

In addition, Butner accepted the Trustee's Deed reserving the rents to the Trustee. Not until after Butner gained possession of the property did he claim the rents in the hands of the Trustee.

Moreover, since Butner was the purchaser of the real property, his debt was discharged and his second mortgage lien was extinguished under the North Carolina doctrine of merger.

Furthermore, it appears from the record that Butner was made whole.

In summary, Butner performed no acts during the arrangement or subsequent liquidating bankruptcy to establish a right to rents superior to the claim of the Trustee.

ARGUMENT

I

The case presents for review a contest between a Trustee in bankruptcy for the general estate and a mortgagee of bankrupt's real property over rental income collected by the Trustee between adjudication and the sale of the property by the Trustee.

It arose from the Bankruptcy Court for the Western District of North Carolina. In overruling the Bankruptcy Judge, the District Court held that the mortgagee became entitled to a lien upon the rents valid against the Trustee by reason of the appointment of an agent to collect rents and pay debts during a time when the bankrupt was a debtor in possession under Chapter XI of the Act. (App. to Pet. for Cert. p. 27a.)

The Circuit Court reversed, holding that Butner did not take steps during the arrangement proceeding or the period following adjudication

sufficient to perfect a lien upon the rental income, absent bankruptcy, according to North Carolina law. Such failure to perfect according to state law caused the Court to deny his claim as against the Trustee in the bankruptcy proceeding (App. to Pet. for Cert. p. 35a-37a).

A. The North Carolina Law

It is well settled that a Trustee in bankruptcy becomes vested with title to bankrupt's property subject to all valid liens and encumbrances. See Section 70 (a) of the Bankruptcy Act (11 U.S.C. § 110(a)).

The nature and extent of those liens and encumbrances are determined by reference to the state law of the situs of the property. Such reference to state law is not only appropriate, but required. See Stellwagen vs. Clum, 245 U.S. 605, 613; Thompson vs. Magnolia Co., 309 U.S. 478, 483-484.

This is eminently proper in light of the doctrine enunciated in Erie Railroad Co. vs. Thompkins, 304 U.S. 64.

Absent bankruptcy, Butner did not have a lien on rental income under North Carolina law. The Deed of Trust instrument under which he claims did not contain an assignment of rents upon default as additional security for his indebtedness (App. p. 445a). Further, the mortgagor in possession is entitled to the rents and profits which the mortgaged premises produce in the absence of a stipulation to the contrary. Even after default, the mortgagor is entitled to the rents and profits of the mortgaged premises prior to the time the mortgagee takes possession by foreclosure. Webster, Real Estate Law in North Carolina §236 (1971); Gregg vs. Williamson, 246 N.C. 356, 98 S.E. 2d 481 (1957); Kistler vs. Development Co., 205 N.C. 755, 172 S.E. 413 (1934); and Parker Co. vs. Bank, 204 N.C. 432, 168 S.E. 681 (1933).

adequate remedy at law. See In re Penny, 10 F. Supp. 638 (M.D.N.C. 1935); Scoggins vs. Cooch, 211 N.C. 677, 191 S.E. 750 (1937); Murphy vs. Murphy, 261 N.C. 95, 134 S.E. 2d 148 (1964).

B. The Split Among the Circuits

In accord with the decision below, the First, Second, Fifth, Sixth, Eighth and Ninth Circuits have ruled that the mortgagee's right to assert his interest in rents and profits is determined with reference to what would have been necessary under state law had there been no bankruptcy. Generally this is taken to mean that the mortgagee must take the same steps, by leave of or through the Bankruptcy Court as would have been necessary to create his lien at state law. See Petition of Cox, 15 F. 2d 764, 765 (1st Cir. 1926); In re Humeston, 83 F. 2d 187, 188 (2nd Cir. 1936); In re Brose, 254 F. 664, 666 (2d Cir. 1918); Merchants' and Mechanics' Bank vs. Sewell, 61 F. 2d 814, 817 (5th Cir. 1932); In re Thomas, 36 F. 2d 221, 222 (5th Cir. 1929); In re American Fuel and Power Co., 151 F. 2d 470, 481

Butner then was not entitled, under state law, to the rents and profits issuing from the collateral until he instituted foreclosure proceedings pursuant to the power of sale contained in his Deed of Trust (N.C. Gen. Stat. §45-4 et. seq.) and gained possession. This procedure involves an adversary proceeding before the Clerk of Superior Court in the County where the property is located. Naturally, a default must be alleged and proved (N.C. Gen. Stat. §45-21.16(d)).

He was also not entitled to have a receiver appointed except as an ancillary remedy to judicial foreclosure (N.C. Gen. Stat. §1-339.1 et. seq.) or foreclosure by power of sale where "before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the profits are in danger of being lost, or materially injured or impaired" (N.C. Gen. Stat. § 1-502(1)). In such situations, the appointment is an extraordinary remedy and will not be granted except upon a showing that the applicant does not have an

(6th Cir. 1945); Tower Grove Bank and Trust Co. vs. Weinstein, 119 F. 2d 120, 122 (8th Cir. 1941); In re Hotel St. James Co., 65 F. 2d 82 (9th Cir. 1933).

The contrary line of authority is in the Third and Seventh Circuits. See In re Pittsburgh-Duquesne Development Co., 482 F. 2d 243 (3rd Cir. 1973); In re Wakey, 50 F. 2d 869 (7th Cir. 1921). Those courts have held that the mortgagee may recover the rents if he can establish an equitable basis for his claim. The rationale for these decisions is that the rights of the creditors are fixed at the adjudication of bankruptcy and the bankruptcy divests the mortgagor's possession of the realty. Therefore, the rents arising thereafter belong to the mortgagee and should not be diverted to general creditors. See 4A Collier on Bankruptcy §70.16 (14th ed. 1976). Under these decisions, however, the mortgagee cannot recover the rents arising during bankruptcy unless he establishes that "the mortgage property was worth less than the mortgage indebtedness." In re Cigar Stores Realty Holdings, 69 F. 2d 823, 824 (2nd Cir. 1934). In those circumstances, the Third and Seventh Circuits regard the rents as belonging to the

mortgagee as a matter of equity as part of the agreed security "to vindicate its own right of property." In re Pittsburgh-Duquesne Development Co., supra, 482 F. 2d at 246.

C. Butner's Acts During The Arrangement Proceeding

Butner apparently concedes that he had no security interest in the rents at state law prior to the petition for arrangement. He nevertheless contends that the intervention bankruptcy entitles him to a lien by operation law in accord with the rule of the Third and Seventh Circuits. He also contends that he performed acts during bankruptcy to establish his lien.

In regard to the latter, he advances the argument that the first and second mortgage holders obtained the appointment of an agent to collect the rental income from debtor's real estate and, that having secured the appointment of a receiver, he was not required to perform additional acts to establish his claim (Pet. Brief p. 44-45). This contention misrepresents the facts

and ignores the record of this case.

In the first place, the motion for appointment of the agent was not filed by Butner. The debtor moved the Court for the appointment of an agent at the request of secured creditors (including Butner) and the unsecured creditors (Creditors Committee) "...with directions to collect the rents, make all mortgage payments, pay taxes, insurance, and repairs and accumulate excess cash flow for the benefit of the secondary lienholders and the unsecured creditors." (App. p. 202a-203a)

The motion and resulting order (App. p. 204a-206a) in no way attempted to create or perfect a security interest in any creditor in respect to the rental income. By its very terms it only provided a means for paying the obligations of debtor contemplated by its amended plan of arrangement for unsecured creditors since it had but one employee (App. p. 202a).

Even if the agent were a receiver within the meaning and scope of Rule 201 of the Bankruptcy Rules of Procedure as the District Court ruled, the appointment in and of itself does not create or perfect a lien on rents valid against the Trustee. The receiver under Rule 201(g) is a "mere custodian unless, upon proper cause shown, his duties are enlarged or otherwise specified by order of court" (Rule 201(g)). A reading of the motion and order relied upon by Butner clearly shows the absence of any finding that Butner had a substantive right to the rental income of the debtor in possession. Indeed, Butner's debt was paid according to its terms during the arrangement until just prior to adjudication and qualification of the Trustee. [See the agent's reports to the court showing payment to Butner or McKaughn monthly amounts of interest due according to the terms of the Deed of Trust (App. p. 251A, 258a, 260a, 263a, 279a,) through November, 1974. Adjudication occurred February, 1975.]

Since Butner was not even entitled to foreclose until default occurred, due process would seem to at least require notice of default to either the court or the agent as a prerequisite to the creation of a lien upon rents since the mortgagee had no lien by contract or operation of law prior to the default. See Mortgage Loan Co. vs. Livingston, 45 F. 2d 28 (8th Cir. 1930).

In summary, Butner did not, by virtue of the appointment of the agent, ipso facto obtain a perfected lien upon rents during the arrangement proceeding. The appointment order decided no substantive rights among creditors with regard to the income; indeed, the order was not the result of any adversary proceeding involving any creditor's substantive right to rents by reason of a perfected lien. It was, rather, a vehicle to make payments to creditors pursuant to its accepted but not yet confirmed plan of arrangement, nothing more, nothing less.

D. Butner's Acts Following Adjudication

The debtor was adjudicated a bankrupt Feb. 14, 1975, 21 months after filing its petition for an arrangement (App. p. 337a) and the Trustee was appointed (App. p. 339a). He became vested with title to all debtor's (now bankrupt's) property pursuant to Section 70 of the Bankruptcy Act (11 U.S.C. §110) subject to all valid liens thereon. The Trustee began collecting the bankrupt's property including rental income for liquidation according to the terms of the Act. See Section 47 of the Act (11 U.S.C. §74) and Rule 605(a) of the Rules of Bankruptcy Procedure.

Butner filed a proof of claim with the court (App. p. 442a). Conspicuously absent from the claim, however, was any claim of lien upon rental income. Rule 302(c) of the Rules of Bankruptcy Procedure requires that "...if a security interest in property of the bankrupt is claimed, the proof of claim shall be accompanied by satisfactory evidence that the security interest has been perfected." An examination of Butner's claim shows he only claimed a security

interest in the real estate described in the Deed of Trust attached as an exhibit to his claim (App. p. 445a).

When, then, did Butner give the Trustee notice that he claimed a lien upon rental income? Examination of the record reveals no notice to the Trustee regarding Butner's or any other creditor's claim upon rental income during the time the Trustee had possesion of the property. As previously mentioned, Butner's proof of claim filed July 1, 1975 (App. p. 442a) made no claim for rents as security for the claim. This was so even though the Trustee had been collecting rents since February, 1975.

In fact, Butner had been made a party to the Trustee's Adversary Proceeding to sell the bankrupt's property free of liens except first Deeds of Trust (App. p. 421a) and yet filed no responsive pleading. This occurred in June, 1975 (App. p. 438a-441a).

The sale was held July 28, 1975 and confirmed by the Bankruptcy Judge on August 4, 1975 (App. p.

562a-571a). Though he had filed no answer on the Adversary Proceeding to sell, he did file a Motion for Amendment and Alteration of Judgment (App. p. 612a-640a) which was denied (App. p. 641a) and he appealed the confirmation order to the District Court (App. p. 604a). Throughout this proceeding and subsequent appeal Butner could have raised his claim upon rents. Yet, he did not. He could have taken steps in the Adversary Proceeding and appeal parallel with state law remedies to protect any claim he may have had upon the rental income. Yet, he did not.

The property was ultimately sold in November, 1975 and Butner was the high bidder at the sale. The Deed to Butner reserved accrued rents to the Trustee (App. p. 672a), but Butner accepted and recorded it.

Thus, Butner elected to wait until he got possession of the property to become entitled to the rents. This is in accord with North Carolina law. See Gregg vs. Williamson, 246 N.C. 356, 98

S.E. 2d 481; Kistler vs. Development Co., 205 N.C. 755, 172 S.E. 2d 413. He belatedly filed a Motion for Distribution of Funds (App. p. 689a), but this was after he got possession of the property.

It should be noted that throughout the period following adjudication until the sale (February, 1975 to November 1975) Butner had other remedies available to him to perfect a lien upon rents. He could have obtained relief from the stay against enforcement of liens imposed by Rule 401 of the Bankruptcy Rules of Procedure by filing a complaint pursuant to Part VII of the Bankruptcy Rules of Procedure. This remedy was available just as Rule 11-44 had been under the arrangement proceeding. The obtaining of consent to pursue his lien on the collateral would have gained him possession much sooner than he got it.

He could have also filed a complaint pursuant to Rule 701 of the Bankruptcy Rules of Proceeding to "recover money or property" or "to determine the validity, priority, or extent of a lien or other interest in property." See Rule 701(1), (2). Had

he done so no one could complain for the doing would have qualified as a substitute for possession in accord with the decision below.

Therefore, Butner did not following adjudication take any steps or perform any acts that would qualify him as a lien claimant upon the rents. In fact, his actions affirmatively showed his willingness to await possession to begin collecting the rents.

II.

The power of Bankruptcy Courts to sell the Bankrupt's assets extends also to encumbered property. In the absence of any reference to the contrary in the order of sale, a Bankruptcy Sale is made subject to valid liens and other encumbrances, in which case the interests of lienholders are in no way affected by the sale. But it may often be impracticable to sell the property subject to liens. Pending or prospective litigation over the validity of liens may be such that any sale on that basis could not be consummated. The presence of encumbrances attached to the property may in any event make a sale subject to liens unattractive to prospective purchasers--as, for example, where the interest rate on the encumbrances is in excess of prevailing interest rates at the time of sale. The presence of one

second Deed of Trust covering several tracts, which have separate first liens thereon, may also make a sale unattractive to prospective purchasers. These and many other reasons may indicate that the interests of the Bankrupt's creditors will be better served by a sale of the Bankrupt's property free of one or more liens and encumbrances. The Court does not require consent on the part of the lienholder and may sell the property despite his objection thereto. But if such consent is expressly or impliedly given, it may result in rendering the lienholder or mortgagee liable for a larger share in the administrative expenses than he would have been called upon to bear if the Court had proceeded against his will. See 4A Collier On Bankruptcy ¶70.97[2], pp. 1131-1142.

A. Reliance Upon The Bankruptcy Court Order of 30 June 1975 And The District Court Order of 7 November 1975

The Order of the Bankruptcy Judge of June 30, 1975, authorized and directed the Trustee to sell the real estate subject to the first mortgages but free and clear of the second mortgage with the lien of the second mortgage transferred from the property to the proceeds of the sale (App. p.438a). No appeal was taken from this Order and it became final. After the sale, the Confirmation Order was appealed by Butner to the District Court (App. p.604a). The Order of the District Court of November 7, 1975, authorized and directed the Trustee to sell the real estate subject to the first mortgages but free and clear of the second mortgage with the lien of the second mortgage transferred from the property to the proceeds of the sale. (App. p.653a).

The only difference in the District Court Order directing the Trustee to resell the real estate was that the second mortgage holders were authorized to use the amount of their debt to bid on the property in lieu of a cash bid. In other words, no one appealed the Orders of the Bankruptcy Court and the District Court wherein the Trustee was authorized and directed to sell the property free and clear of the second mortgage with the lien of the second mortgage transferred to the proceeds of the sale. All parties relied upon the plain meaning of the said Orders and acted accordingly. If there had been any question about whether the lien of the second mortgage was transferred from the real estate to the proceeds of the sale, then an appeal would have been taken from said Orders. The fact of the matter is that all parties believed the Orders to mean just what they plainly stated.

B. The Actual Sale

Pursuant to an Adversary Proceeding, the collateral was sold free and clear of the second mortgage lien with the lien transferred from the property to the proceeds of the sale. The District Court allowed the second mortgage holders to bid at the sale with the amount of their debt in lieu of a cash bid. Butner became the highest bidder at the resale of the collateral in the amount of $174,000.00. If the said mortgage holder had actually paid that amount of the bid, this money would have been distributed to second mortgage holders, less the Trustee's commissions. Thus, none of the funds in the hands of the Trustee were derived from the sale of the collateral and the balance of this claim was disallowed as a secured claim by the Bankruptcy Judge.

Admittedly, prior to the sale, Butner was a secured creditor. After the sale, he no longer had a security interest because it was "transferred to the proceeds of the sale." This kind of bankruptcy procedure, i.e., a sale free of liens with the liens transferred to the proceeds, either means what it says or the Bankruptcy Courts need to be otherwise informed because the procedure is quite common across the country. It is submitted that this procedure is valid. After the sale, Butner's mortgage was effectively cancelled, else, he could not have resold the properties and refinanced them as he subsequently did. Since Butner's mortgage was cancelled by law, he no longer had a lien on the real estate.

C. The Trustee's Deed

At the resale of the real estate, the Trustee sold the real estate but did not sell, convey or transfer the collected rents. The Trustee's Deed dated November 19, 1975, to Butner, contained the following reservation:

> "The accrued rents and the right to collect unpaid accrued rents from the above-described tracts of real estate are hereby expressly not conveyed, but are reserved to the Grantor. (App. p.658a).

D. Equity

A reading of the Order of the Bankruptcy Court dated July 1, 1976, reflects that the Bankruptcy Judge was aware of the equities in this matter. (App. p. 770a). No Appellate Court has yet found any of the Bankruptcy Judge's findings to be "clearly erroneous " under

Bankruptcy Rule 810. Thus, the Appellate Courts are bound by the findings made by the Bankruptcy Judge. In this case, there are no special equities in favor of Butner's claim. While the District Court stated that it found "no difficulty in determining that equity requires that rents collected" belonged to Butner, the Court of Appeals properly observed that "the District Court failed to articulate the equitable considerations that it thought required the result that it reached." (App. p. 802a). The record also indicates that the property was worth more than the bid-in price indicated and that Butner was not only made whole from his purchase of the Bankrupt's real estate, but he apparently profited from the ultimate disposition of the property. See Affidavit And Supplemental Report To The Court, App. p. 775a. It would not be equitable to now give him a windfall of the rents. In these

circumstances, the Court of Appeals correctly concluded (App. p. 802a) that even "[i]f equity has a part in the resolution of a question of this type . . . equity does not supply the answer here."

Further, it would be strange indeed for "equity" to create a lien where none existed and that is the result should this Court rule that Butner is entitled to the rents. To so hold would destroy the generally accepted principles of real estate law in North Carolina.

III.

A. Valuation Of The Second Mortgage By The Bankruptcy Court

Section 57h of the Bankruptcy Act and Bankruptcy Rule 306(d) deal with the fixing of the value of the security of the secured party's claim. The Bankruptcy Court may utilize one of several methods for this valuation. The first is by converting the security into money by a public sale.

Another way is by agreement, arbitration, compromise, or liquidation, as the Court may direct. The public sale indicated the value of the security of the second mortgage holders. The sale showed to the Bankruptcy Court that the second mortgage security was only worth $174,000.00 under Section 57h of the Bankruptcy Act and Bankruptcy Rule 306(d). Therefore, since the lien was transferred to the proceeds of the sale (in the sum of $174,000.00), it (the security) was fully satisfied by the sale. The balance of Butner's claim was allowed as unsecured by the Bankruptcy Court (App. p. 770a).

B. The Debt Represented By The Second Mortgage Was Extinguished Under the North Carolina Doctrine of Merger

It is the general rule (and the law in North Carolina) that where one who holds a mortgage on real estate becomes the owner of the fee, the two estates

are thus united in the same person and the former estate mergers in the latter. The equitable or lesser estate (in this case, the second mortgage) is said to be swallowed up, or "drowned out," by the legal or greater estate (fee simple). This is the doctrine of merger. Hussey v. Hill, 120 N.C. 312, 26 S.E. 919; Furniture Co. v. Potter, 188 N.C. 145, 124 S.E. 122; Waff Bros. v. Bank, 289 N.C. 198, 221 S.E. 2d 273 (1975); Webster, Real Estate Law In North Carolina §365 (1971); and 51 Am. Jur., 2d, Liens, §47.

In Tiffany On Real Property, 3d Ed. §§1480 and 1481, the doctrine of merger is analyzed as follows:

> The theory on which, upon the acquisition by one person of the mortgaged land and of the mortgage debt with the incidental lien on the land, the debt, and with it the lien, may ordinarily be regarded as extinguished, would seem to be that, under such circumstances the person owning and controlling the debt can usually have no object in keeping it alive, it being in

> substance a claim against his own property, and he may consequently be presumed to intend that the debt shall be extinguished, a presumption to which, as tending to the simplification of titles, the courts are ready to give full effect.

Under the facts of this case, at or prior to the resale of the real estate, Butner had become the sole owner and holder of the second mortgage. At the resale of the real estate, Butner purchased the real estate. Thus, under the doctrine of merger, the debt was discharged and the second mortgage lien extinguished. Therefore, Butner had no debt to prove in bankruptcy at the final meeting of creditors. Technically, the Bankruptcy Judge should not have even allowed Butner an unsecured claim.

IV.

Prior to bankruptcy, the second mortgage holders did not take any action to secure possession or commence foreclosure proceedings or secure the appointment of a receiver or sequester or take steps to sequester or attach the rents and profits in any manner. Neither did the second mortgage holders do any of these things after the conversion from the Chapter XI proceeding to straight bankruptcy.

A. The Holders Of The Second Mortgage Filed No Adversary Proceeding To Recover The Property And Obtain Relief From The Bankruptcy Stay In Order To Foreclose Their Lien Under Available State Remedies

The Bankruptcy Act as amended in 1973 provides that the Petition in Bankruptcy operates as an automatic stay against any act or proceeding to enforce a lien on the property of a bankrupt

estate. This automatic stay is provided for in Bankruptcy Rule 601. All creditors receive notice of the effect of the Petition as a stay along with notice of the first meeting of creditors. This stay remains effective during the pendency of the case unless sooner modified by the Court or the property subject to the lien otherwise passes from the control of the Court.

Any party subject to the stay may, however, obtain relief from the automatic stay and recover property from the bankrupt estate as provided for in the Rules of Bankruptcy. All such matters are governed by the Part VII Rules entitled "Adversary Proceedings." The Part VII Rules of Bankruptcy begin with Rule 701, which provides that a party may institute an Adversary Proceeding before the Bankruptcy Judge to "recover money or property" and to "obtain relief from a stay." Bankruptcy

Rule 703 provides that "[A]n adversary proceeding is commenced by filing a complaint with the court."

During the pendency of the bankruptcy proceeding, neither of the three beneficiaries of the second mortgage instituted any Adversary Proceeding before the Bankruptcy Court to recover the property and obtain relief from the stay. Had they done so, the Court would then have had to make a decision as to whether to release the property from the bankrupt estate so that the second mortgage holders could foreclose under state law. No such action and no such question was ever presented to the Bankruptcy Court for determination, even though the second mortgage holders had ample opportunities to do so.

At the first meeting of creditors on April 16, 1975, the Bankruptcy Judge directed the Trustee

to institute appropriate proceedings to sell the real estate free and clear of the second mortgage. If the second mortgage holders had wanted to, they could have immediately filed an Adversary Proceeding to recover the property for purposes of foreclosure under state law.

In June of 1975, the Trustee filed the Adversary Proceeding seeking to sell the real estate free and clear of the second mortgage. Of course, all the mortgage holders were joined as party Defendants, but Butner did not file an Answer. In fact, no creditor appeared at the hearing when the Bankruptcy Judge entered the Order for Sale on June 30, 1975. If the second mortgage holders had wanted to they could have appealed said Order within ten days from June 30, 1975, but they chose not to do so.

Also, neither of the second mortgage holders appealed the District Court's Order of Resale dated November 7, 1975, which provided for a sale of the property free and clear of the second mortgage. In fact, when the Confirmation Order of the Bankruptcy Judge was appealed to the District Court, Butner orally argued that he wanted one of two things: (a) abandonment of the real estate to the second mortgage holders or (b) allow the second mortgage holders to bid with the amount of their debt in lieu of a cash bid. At no time did any of the second mortgage holders ever orally or in writing seek to recover the property so that they could foreclose their mortgage under state law.

Therefore, Butner and the other second mortgage holders failed to comply with the substantive law of North Carolina and at no time did

they meet the requirements set forth in Gregg v. Williamson, Kistler v. Development Co., and Parker Co. v. Bank, supra. Further, Butner and the second mortgage holders failed to utilize and comply with the Rules of Bankruptcy.

CONCLUSION

The opinion of the Court of Appeals should be affirmed and this matter be remanded to the Bankruptcy Court for disposition in accordance with the Bankruptcy Final Order of July 1, 1976.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the United States Supreme Court, the undersigned hereby certifies that he has this day served three copies of this Brief on each other party separately represented by depositing the same in the United States post office in Hickory, North Carolina, with first class postage prepaid, at the following addresses:

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This the 22nd day of September, 1978.

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